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PRINTED FOR  
WILLIAM GREEN & SONS,

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EDITED BY

JOHN CHISHOLM, M.A., LL.B.

ADVOCATE, AND OF THE MIDDLE TEMPLE BARRISTER-AT-LAW

VOLUME IV

*CROP* TO *ELECTIONS*

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OF

## THE LAW OF SCOTLAND

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**Crop.**—Rent of land is said to be due to a landlord by his tenant in respect of the possession of the land and the crop grown thereon (see **TERMS OF PAYMENT** (legal and conventional)). In consequence of this principle, a landlord, in all farms let prior to 1881, enjoyed, and still, in a limited number of cases, enjoys, a right of hypothec over his tenant's crop—the security thus given extending to the rent of the year of which the crop is the produce. (For the nature of this right and the extent to which it still exists, see under **HYPOTHEC**.)

*Waygoing (Awaygoing, Outgoing, or Last) Crop.*—Under an ordinary lease of an arable farm, the tenant enters at Whitsunday to the houses, fallow, and grass, and at separation (or Martinmas) to the crop land. The term of his removal from the houses and grass is therefore Whitsunday: and the waygoing is the crop which, prior to said removal, he has sown during the last year of his lease, and which, in virtue of the doctrine *messis sementem sequitur*, he is entitled to reap at the ensuing harvest (Bell, *Prin.* 1270; Rankine, *Leases*, 387 *et seq.*; *Drysdale*, 1848, 10 D. 467: affd. 6 Bell's App. 455). Hay sown with the penult crop, and yielding its first crop in the year of removal, is included in the waygoing crop (*Kith*, 1825, 4 S. 267). A tenant is presumed to get as many crops from the land as he has been years in possession (*Forrester*, 1828, 6 S. 875: affd. 4 W. & S. 136). But the application of the rules as to a waygoing crop in improving leases may have the effect of giving a tenant one more crop than he has been years in possession (*Baird*, 1865, 3 M. 543). And where there is nothing to prevent it in the lease, and it is not prejudicial to the landlord, a tenant may change from one shift to another, and thereby become entitled to a waygoing crop, which otherwise he would not have had (*Hunter*, 1862, 24 D. 1011). Although a tenant has deserted possession, he has been held entitled to reap the crop he has sown, on returning and paying arrears (*Downie*, 1715, Mor. 14729).

*Access to Lands.*—To enable him to reap the waygoing crop, the tenant who has vacated the houses and grass at Whitsunday is held to have a right of retention or access till separation or the following Martinmas (*Wight*, 1864, 2 M. (H. L.) 35; *Black*, 1894, 21 R. (H. L.) 72; *Waldie*, 1896, 23 R. 792). But his right is strictly limited to right of access. Apart from special provision in the lease, the tenant is not entitled to

stow away the crop in barns and yards, and to thrash it out on the farm (*Gatherer*, 1870, 8 M. 379). However inconvenient to himself, he must make arrangements for thrashing his crop elsewhere (*Anderson*, 1809, Hume, 842. But see *Finlayson*, 1829, 7 S. 617, as to the case of an extraordinary removing).

*Taking over at Valuation.*—A very usual condition in leases is that the landlord or incoming tenant should take over the waygoing crop at a valuation before it is reaped (*Nivison*, 1883, 11 R. 182; *Curruthers*, 1890, 17 R. 769), or by measurement after cutting (*Still's Trs.*, 1829, 8 S. 9; *Logan*, 1887, 15 R. 115). The amount paid therefor is the market value of the crop (*Erskine's Trs.*, 1870, 9 M. 54). Intimation that the clause is to be taken advantage of, need not be in writing (*Duke*, 1862, 24 D. 547).

*Contrary Stipulation.*—The rule as to a waygoing crop may be superseded by express or implied contrary stipulation (*McMichan*, 1801, 4 Pat. 170; *Brodie*, 1777, M. App. Tack, 3; *Blair*, 1826, 4 S. 365; *Gray*, 1800, Hume, 804; *M. Tweeddale*, 1845, 17 Sc. Jur. 198, and 1846, 8 D. 411: *revd.* 6 Bell's App. 125 (application to liferent leases)).

[Rankine, 387 *et seq.*] See CROPPING; DUNG; GRASS.

**Cropping.**—Apart from any conditions or stipulations in his lease, the tenant of a farm in Scotland must conform to the rules of good husbandry, *i.e.* he may not scourge or deteriorate the land by undue cropping (*Maxwell*, 1776, 5 B. S. 575; *Hunter*, 1862, 24 D. 1011; *affd.* 1 M. (H. L.) 49). This rule is equally applicable where a farm is let on lease for a number of years or from year to year (*Fleming*, 1860, 22 D. 1025). The Court does not take upon itself the task of laying down regulations as to the proper mode of cultivation: it merely restrains unwarranted acts that are threatened, or gives damages where such acts have been committed (*Meldrum*, 1738, Elch. Tack, 4). In determining a question of mismanagement by deviation from the rules of good husbandry in the cropping of land, the Court remits to a man of skill to report (*Hunter, sup.*). The amount of damages, when awarded, is apparently assessed on the calculation of a particular course of management, being the proper mode of cropping (*Thomson's Reps.*, 1824, 3 S. 275). It is no answer to a claim of damages for miscropping, that the lands are in as good condition at the expiry as at the commencement of the lease, if, by adherence to the rules of good husbandry, they should have been better.

In all leases, however, express conditions are inserted in aid of the above-implied obligation, such conditions having mainly for their object the enforcement of a particular rotation of crops upon the farm, *e.g.* white, green fallow, or bare fallow, and grass, with sometimes black crop and other occasional products. The taking of white crops, which ripen their seeds, in successive years, is usually prohibited; the proportion of land under turnip or bare fallow each year is fixed; and provision made that the farmyard dung, straw, and hay are not to leave the farm. Throughout Scotland generally, the five-shift course is the ordinary rotation; but in certain districts other rotations prevail. (For particulars as to different rotations, see *Stephen, Book of the Farm*; Rankine, *Leases*, 382 *et seq.*; *Taylor*, 1869, 7 M. 351; *Cs. Stair*, 1883, 20 S. L. R. 315; *Colvin*, 1871, 8 S. L. R. 149).

The conditions as to cropping fall to be construed fairly and rationally, so as to find out the intention of parties (*Suttie*, 1828, 6 S. 1122; *Simpson*, 1823, 2 S. 405, (N. E.) 360; *Keith*, 1825, 4 S. 267, (N. E.) 272). Hence it was held that a tenant who was bound to cultivate in a husbandlike



manner, and not run out the lands, and also to leave a quarter of the farm in pasturage at the end of the lease, must adhere to one or other of the rotations practised in the district (*Carron Co.*, 1858, 20 D. 681). But if a lease, after the general clause binding the tenant to conform to the laws of good husbandry, goes on to state what the parties mean thereby, the tenant is free from liability for miscropping where he has strictly adhered to the course of cropping laid down in the lease (*Stark*, 1826, 5 S. 45).

The measure of damages awarded for miscropping, where there is a clause in the lease fixing the rotation of crops, is the sum required to put the farm into the condition in which it should be (*Fraser*, 1834, 12 S. 684). A claim by a landlord under such a clause may be barred by acquiescence in the system adopted by the tenant (*Murray's Trs.*, 1806, M. App. Tack, 12; *Hall*, 1847, 9 D. 1557). Many of the conditions relative to the cropping of farms have particular reference to the management thereof towards or at the ish, rather than during the currency, of the lease. (For these, see under CROP (*Waygoing*): DUNG: GRASS.)

**Cross-Examination.**—The party against whom a witness is adduced has the right to cross-examine such witness after the adducer's examination in chief is ended. Where there are two or more distinct defenders to a cause, each of them has the right to avail himself of the cross-examination by the others without repeating or expressly adopting it, and such cross-examination is in like manner available to the pursuer against each (*Ayr Road Trs.*, 11 R. 336). Even though a witness is adduced merely to show himself (*e.g.* in a matter of supposed mistaken identity), he must be sworn, in order that the adducer's opponent may have the opportunity of exercising his right of cross-examination (*Milne*, 5 Irv. 229). An exception to the right of cross-examination occurs in the case of a pursuer who has closed his proof without leading any evidence on a separate branch of his case. He cannot cross-examine the defender's witnesses on that branch of his case which he is held to have given up. This rule obtains notwithstanding the provisions of s. 4 of the Law of Evidence Amendment Act, 1840, noted below (*A.B. v. C.D.*, 6 D. 1148).

The purpose of cross-examination is, in general, to test the extent and accuracy of the witness's knowledge, and his credibility as a witness. With regard to attacks on a witness's character as affecting his credibility, it is allowable to cross-examine him as to his having been convicted of a specified crime or offence, whether of the more heinous kind, which prior to the Law of Evidence Act, 1852 (15 Vict. c. 27, s. 1), disqualified a witness altogether, or of a less serious kind, provided the crime or offence be one which (unlike, say, assault or breach of the peace) points to dishonesty of character. But the crime or offence must be exactly specified, otherwise such cross-examination becomes inadmissible. The witness cannot decline to answer a question as to his having been convicted of a specified crime (*Johnston*, 2 Broun 401). It is also admissible, for the same purpose, to ask the witness if he has committed a specified crime, although he has not been tried for it, but in this case the witness is entitled to avoid a confession by declining to answer (*Pender*, 1 Swin. 25). On the other hand, it is not allowable to assail a witness's credibility by cross-examining him regarding immoral, dissolute, or base conduct attributed to him. To this rule, which is firmly established, there are certain exceptions, more apparent than real. Thus, in criminal prosecutions for offences against chastity, the complainer, being adduced as a witness for the prosecution, may be cross-

examined fully as to her previous character for chastity (1 Hume 304, 1 Al. 215, 2 Al. 531). Again, where the character of one or both of the parties to the cause is in issue, and such party or parties are adduced as witnesses, cross-examination as to matters of conduct affecting their character in those particulars in which it is called in question is competent, provided fair notice has been given on record. The reason for these apparent exceptions is that in these cases evidence regarding such particulars of character is evidence on the merits of the cause as well as evidence affecting credibility. Examples frequently occur in actions of damages founded on offences against chastity, in consistorial causes, in actions for defamation, and in affiliations (see *Dickson*, ss. 6-18, and s. 1622, and cases there cited; see also *A. v. B.*, 22 R. 402). In a divorce case for adultery at the wife's instance, when the evidence of adultery is supplied by persons engaged in prostitution, the defender is, for obvious reasons, entitled to cross-examine them as to their mode of life (cf. *Walker*, 9 M. 1071; *Tennant*, 10 R. 1187). Again, it is allowable, with a view to test credibility, to cross-examine a witness regarding his connection with the cause or the parties, or regarding any circumstances in his position which will bias his mind or supply a motive for exaggeration or concealment (*King*, 4 D. 124, per Hope, L. J. C.). It is also proper, for the like purpose, to cross-examine a witness as to statements made by him on a former specified occasion which are inconsistent with the evidence he has given in chief (15 Vict. c. 27, s. 3). Previous statements made on precognition, form, according to practice and what is thought to be the better opinion, an exception to this rule, and cannot competently be made matter of cross-examination (*O'Donnell*, 2 Irv. 236; *Emsley*, 1 M. 209; but see *Whyte*, 11 R. 710). On the other hand, statements made by a witness on record, or on oath, in a previous action, are proper matters for cross-examination: but, in the latter cases, the witness may avoid a confession of perjury by declining to answer. In like manner, if a person who has pled guilty to a criminal offence committed by himself along with others be examined as a witness on behalf of the others when brought to trial, he can be cross-examined as to the statements made by him in his declaration (*Wilson*, 3 Irv. 623). Where the credibility of a witness is to be impugned on the ground of inconsistent previous statements, and these statements are to be proved by the cross-examiner at a subsequent stage, it is imperative that the witness should be cross-examined upon them (*Gall*, 9 M. 177).

The right of cross-examination carries with it, in the case of the defender, a duty to "lay a foundation" for the counter-case he is to endeavour to establish later on by means of his witnesses: that is to say, he must put such questions as will give the pursuer and his witnesses fair notice of the case to be made for the defence and a fair opportunity of meeting it in the witness-box. It is matter of discretion and experience how far cross-examination of this kind must in any particular case be carried in order sufficiently to discharge this duty. It may be said, in general, that where it appears from the examination in chief of any of the pursuer's witnesses that they may have had an opportunity of becoming acquainted with circumstances on which the defence is founded, and with regard to which the defender is to lead evidence, or where the defender intends to lead evidence which will show that any one or more of the pursuer's witnesses were present at or took part in any occurrence which is founded on in defence, and which is to be spoken to by the defender's witnesses, the defender must cross-examine such witnesses for the pursuer on their knowledge of these circumstances or occurrences, or upon their grounds for ignoring or disregarding them in their evidence in chief.

If he fail to do this, he may be prevented from leading evidence regarding them afterwards, on the ground that the pursuer had no opportunity of proving by his witnesses that the circumstances in question were not true in fact, or of establishing by the same means that they were of no materiality: or his evidence may be admitted subject to the recall by the pursuer of his witness or witnesses for re-examination (15 Vict. c. 27, s. 4); or his evidence may be allowed for what it is worth, subject to the criticism (which is necessarily most damaging) that the defender did not give the pursuer and his witnesses an opportunity of rebutting it. It will depend on the materiality of the point to which the evidence relates, and on the discretion of the Court (15 Vict. c. 27, s. 4), which course is taken (see *Robertson*, 1 R. 532). This duty is in no case more peremptory than in cases which turn on conversations, or on the precise transactions at a meeting, and the extent and minuteness of the cross-examination is greatest in such cases.

Cross-examination may include any matter *in causa*, and is not confined to the matters embraced in the examination in chief (Law of Evidence Amendment Act, 1840 (3 & 4 Vict. c. 59, s. 4)).

Leading questions—that is, questions which suggest the desired answer—are generally admissible in cross-examination. The admissibility of such questions is, however, subject to the discretion of the presiding judge. The privilege accorded to cross-examination in this respect does not properly apply to cross-examination *in causa* beyond the matters deponed to in chief, especially if the witness, though adduced by the other party, is really a witness favourable to the cross-examiner. See HAYER; COMMISSION, PROOF ON; EVIDENCE; WITNESS; LEADING QUESTION.

**Crown, The.**—*TITLE TO THE CROWN.*—(a) *History.*—The Saxon king was elected by the Witan, though the choice was generally made from the royal family. On occasions when conquest constrained them, they went beyond the royal family, and thus Canute was chosen king. In this way birth and election went together: and it was on such titles that the first four Norman kings held the crown. The early Scottish kings seem to have succeeded by a similar right. The idea of hereditary right, aided by the feudal land law, grew stronger as society became more settled, and latterly became the accepted rule. Thus, by survivance, the next heir to the crown succeeded immediately on the death of the last holder, and there was no interregnum. At critical times of our history, the theory that popular election to the crown was an element in the title has been made to serve useful ends and to avoid disruption. Thus the absolute divine right was overcome at the overthrow of the Stuart dynasty, and the title to the crown in William of Orange was made good by parliamentary ratification.

(b) *Present Title to the Crown.*—The succession to the Crown of England was fixed by Parliament, in 1700, on the heirs of Sophia, widow of the Elector of Hanover, daughter of Elizabeth, Queen of Bohemia, the daughter of James I. (12 & 13 Will. III. c. 2). Under this settlement the crown is now held, subject to certain conditions. They are as follows:—

(1) Every person who is or shall be reconciled to the Church of Rome, or shall hold communion with the Church of Rome, or shall profess the popish religion, or shall marry a Papist, is excluded from the crown, and the people are absolved from their allegiance. The crown goes to the next in succession being Protestant, as if the person who incurred the disability were dead (1 Will. and Mary, Sess. 2, c. 2, s. 9).

(2) Every king or queen succeeding to the throne by virtue of the Act of Settlement must make declaration against transubstantiation at the first day of the meeting of the first Parliament, or at the coronation (1 Will. and Mary, Sess. 2, c. 2, s. 10).

(3) Every king or queen shall have the Coronation Oath administered at his or her coronation, according to the provisions of 1 Will. and Mary, c. 6, 12 & 13 Will. III. c. 2, s. 2).

(4) Every person who shall come into possession of the crown shall join in communion with the Church of England (12 & 13 Will. III. c. 2, s. 3).

Other restraints and disabilities upon the holder of the crown have been repealed.

By the Act of Union with Scotland in 1707 (6 Anne, c. 2), it was provided that the succession to the Crown of Great Britain should be the same as that provided for the succession of the Crown of England by the Act of Settlement, and a similar provision was inserted in the Act of Union with Ireland in 1800 (39 & 40 Geo. III. c. 67) (Anson, *Law and Custom of the Constitution*, vol. ii. p. 63).

**ACCESSION TO THE CROWN.**—The modern forms used on the accession of a new sovereign to the crown, consist first of a proclamation by the Lords Spiritual and Temporal and others, including the Lord Mayor of London, proclaiming that the heir to the crown has become the sovereign of these realms. The new sovereign addresses the Council, and subscribes an oath for the security of the Church of Scotland. The Privy Council are then sworn, and the sovereign issues a proclamation continuing in their offices all who, on the death of his predecessor, were “duly and lawfully possessed of or fully invested in any office, place, or employment, civil or military,” within these realms. The declaration against transubstantiation is taken in accordance with the requirements of the Bill of Rights.

**CORONATION.**—The sovereign is presented to the people by the Archbishop of Canterbury as the undoubted sovereign of the realm, and they are asked if they are willing to do homage. After certain ceremonial, the Coronation Oath is administered. The anointing follows, and then the homage of the peers.

The bond between the sovereign and the people is finally ratified by their natural allegiance to their sovereign. The form of the Oath of Allegiance is now settled by 31 & 32 Vict. c. 72. All who hold public office take the oath, but allegiance is due from all the people of the realm.

For the legislative, executive, and judicial functions of the Crown, see **SOVEREIGN**.

**Crown Agent.**—The Crown Agent is the solicitor to the Lord Advocate's Department, and has charge of the Crown Office, Edinburgh, the headquarters of criminal administration. Correspondence between the Lord Advocate and his deputies on the one hand, and the Procurators-Fiscal on the other, is carried on through the Crown Agent. The arrangements for the holding of sittings of the High Court of Justiciary are made between the Crown Office and the Justiciary Office. All general orders and circulars prepared by the Lord Advocate for the instruction of Crown Counsel, Procurators-Fiscal, Sheriff Clerks, or other public officials, are issued from the Crown Office. The office is also utilised for the collection of particulars required for Parliamentary returns, and for obtaining information for the Lord Advocate on matters of parliamentary interpellation or departmental inquiry. The Crown Agent also acts as agent in all judicial proceedings,



civil or criminal, in which the Lord Advocate appears as representing his own department. The Crown Agent is appointed by the Lord Advocate, and holds office during pleasure. Accordingly, he goes out of office with the Lord Advocate. According to the ordinary routine of criminal work, which is the most important part of the work of the Crown Office, the Procurator-Fiscal reports all serious offences, accidents, fires, or sudden deaths to the Crown Agent. The latter lays the report before Crown Counsel, who return it to him with their instructions marked thereon. These instructions are then transmitted by the Crown Agent to the Procurator-Fiscal. At all trials in Circuit Courts of Justiciary the local Procurator-Fiscal acts as agent at the trial, but at trials in the High Court at Edinburgh the Crown Agent attends in that capacity, the Procurator-Fiscal being also present.

**Crown Charters.**—Original charters, properly so called, are now seldom granted by the Crown, because most of the lands in the country have already been disposed by charter, or its equivalent. On account of the provision of sec. 4 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), to the effect that it is unnecessary for the renewal of an investiture to obtain from a superior any charter, precept, or other writ by progress, and that it is incompetent for a superior to grant any such writ by progress, it has, since the commencement of that Act, been unnecessary and incompetent for a proprietor of lands held of the Crown to obtain, *e.g.*, a Crown charter or writ of resignation, or a Crown charter or writ of confirmation, for the granting of which writs full provision was made by the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, ss. 80 to 83). It is, however, still competent to obtain from the Crown charters of *novodamus*, charters of *ultima heres*, charters of bastardy, charters of mines and minerals under the Statute of 5 June 1592 (intituled “An Act for the furthering of the King’s Commodities of Mines and Metals”), charters upon forfeitures for high treason, and precepts and writs of *clere constat*.

Before the abolition of writs by progress by the Conveyancing Act, 1874, a clause of *novodamus* was often inserted in a charter by progress granted by the Crown, with the object of securing the grantee of the charter against the effects of feudal delinquencies incurred by his author or any former vassal in the lands. As already stated, however, charters of *novodamus* can still be competently obtained from the Crown, and, as in the case of charters of *novodamus* from subject-superiors, they may be obtained when the titles of heritage have been lost, or when it is desired to obtain an extension of the original grant, *e.g.* a right to salmon fishings, or an alteration in the conditions of the holding. The form of a charter from the Crown will be found in the *Juridical Styles*, i. 363. When a Crown charter of *novodamus* is desired, the applicant requires to obtain the consent and approbation of the Commissioners of Her Majesty’s Woods, Forests, and Land Revenues, or any one of them, and of the Commissioners of the Board of Trade, under the hand of their secretary for the time being: and he also requires to produce written evidence of such consent, along with a note, praying for a charter in terms of a draft thereof, prepared by a writer to the signet, which note and draft he requires to lodge in the office of the Sheriff of Chancery (see secs. 64 and 88 of Act of 1868, and sec. 57 of Act of 1874). After being revised and adjusted, the draft charter is engrossed in Chancery, and thereafter lodged with the Queen’s and Lord Treasurer’s Remembrancer, who transmits it for the sign manual of Her Majesty, and the signatures of the Commissioners of Her Majesty’s Treasury, or any two of them, or, in case the charter

of *norodamus* be of lands held of the Prince, and His Royal Highness be of full age, for the consent and approbation of the Prince, signified under his sign manual and the signature of the Commissioners.

After the charter of *norodamus* has been so signed, the Great (or Union) Seal may be attached to it at the desire of the grantee, but all Crown writs are now as effectual without the seal as if the same were appended thereto (see 31 & 32 Vict. c. 101, s. 78).

When the Crown, as *ultima hæres*, succeeds to land held of the Crown, the *dominium utile* is deemed to be consolidated *ipso jure* with the *dominium directum*; and when the Crown succeeds to lands held of a subject-superior, the Crown becomes proprietor of the *dominium utile*. The practice is for the Crown to make, under certain conditions, a gift of the land to which it so succeeds to the person who has the best claim thereto, and the procedure in the donation is (1) the obtaining of a warrant from the Crown, through Exchequer, for making the gift; (2) the finding of caution by the donee; and (3) the obtaining of a deed of gift (see *Juridical Styles*, i. 359 and 364 *et seq.*). The deed of gift passes the seal, and is signed by the Director of Chancery, and the donee named under it can complete a title by recording it with a warrant of registration in the appropriate register of sasines. What has been said regarding gifts of *ultima hæres* applies to gifts in bastardy.

It is unnecessary to make any remarks on charters of forfeiture, for they are now never used.

If the Crown grants a charter of mines and minerals under the Statute of 1592, the form is not dissimilar from that used in a grant of mines and minerals by a subject-superior (see *Juridical Styles*, i. 370).

An heir, on the death of his ancestor who held lands of the Crown, can complete his title by a writ or precept of *clare constat*, just as if his ancestor held the lands of a subject-superior: but as Crown writs and precepts of *clare constat* are granted only after an heir has expedited a service in his favour, they are, it is believed, never applied for in practice. The procedure for obtaining them is set forth in the article CLARE CONSTAT, PRECEPTS AND WRITS OF.

[For procedure in obtaining Crown charters, or writs, or precepts, see 31 & 32 Vict. c. 101, ss. 63 *et seq.*; and on Crown charters and writs, see *Juridical Styles*, 4th ed., vol. i. 341 *et seq.*, and 5th ed., vol. i. 352 *et seq.*]

**Crown Debts.**—By the Treaty of Union, the English revenue laws were introduced into Scotland; and in place of the Scottish Exchequer Court, a new Court of Exchequer was instituted for deciding all questions relating to the revenues of customs and excise. This Court had the same power and functions as the Court of Exchequer in England; and it was provided that the forms of recognisance and other securities for the king's debts, and of actions and prosecutions thereon, should be similar to the forms in England (6 Anne, c. 26; Ersk. i. 3. 30). In this way the provisions of the Statute 33 Hen. VIII. c. 39, as to the prerogative and preference of Crown debts, were introduced into Scotland. The effect of the Statute of Henry VIII. was to give the Crown a preference over the estate of its debtor in every case where the other creditors had not obtained final judgment. In applying this regulation to Scotland, an exception was allowed in the case of Scots heritage, where the same rules as to obtaining preference apply between the Crown and a subject as between subject and subject (Ersk. i. 3. 31; *Burnet*, 1754, Mor. 7873). As to the transference of the power, authority, and jurisdiction of the Court of Exchequer to the Court of Session by the Act of 1856, see under EXCHEQUER (COURT OF).

Crown debts were formerly recovered by a speedy remedy in the Court of Exchequer by means of Writs of Extent (Bell, *Com.* ii. 41). Diligence by the Crown is, however, now regulated by the Exchequer Act (19 & 20 Viet. c. 56), which practically supersedes these Writs of Extent. Sec. 42 of that Act provides that nothing contained in the Statute "shall impair, injure or affect any preference of the Crown in competition with other creditors; and in all questions of preference or competition the execution of any charge at the instance or on behalf or for behoof of the Crown, and in the case of deceased Crown debtors to whom no such charge has been given in their lifetime, the execution of any arrestment or poinding at the instance or on behalf or for behoof of the Crown shall be deemed and taken to be equivalent in all respects to the teste of a Writ of Extent according to the existing law and practice." Hence the Crown has a preference over ordinary creditors if a charge for debt or other diligence at its instance be begun before a decree of furthcoming or a final order after a sale under the poinding is obtained (19 & 20 Viet. c. 56, s. 30). Even a landlord's diligence in virtue of his hypothec does not avail against the Crown unless a sale in the sequestration has actually taken place before the execution of a charge by the Crown (Bell, *Prin.* 1241; Rankine, *Leases*, 347, 355; *Robertson*, 1802, M. 7891). But a right of pledge or lien is not injured by the diligence of the Crown (*The King*, 1826, Bell, *Com.* ii. 54, note); and it has been thought that compensation may be pleaded against the Crown (*ibid.* ii. 55).

Crown debts are exempt from the operation of the bankruptcy laws (*ibid.* ii., 5th ed., 330, 453). At all events, until actual transference of the debtor's property to the trustee, the Crown may by diligence obtain a preference over the other creditors (*The Crown*, 1856, 18 D. 366, L. Maekenzie, p. 373). A similar preference may, in a cessio, be obtained up till the date of the decree. A discharge under the Bankruptcy Acts does not operate so as to discharge any person "with respect to any debt due to Her Majesty or her successors, or to any debt or penalty with which he shall stand charged at the suit of the Crown, or any person for any offence committed against any Act or Acts relative to any branch of the public revenue, or at the suit of any Sheriff or other public officer upon any bail bond entered into for the appearance of any person prosecuted for any such offence, unless the Commissioners of Her Majesty's Treasury for the time being shall consent to such discharge" (19 & 20 Viet. c. 79, s. 148; Goudy on *The Law of Bankruptcy*, pp. 406, 427). In ranking under a sequestration, the Crown, apart from the execution of diligence, is, in virtue of the provisions of 43 Geo. III. c. 150 (now 43 & 44 Viet. c. 19, s. 88), preferred to all ordinary creditors, and to claims secured by diligence or assignation for all assessed taxes, land-tax, and property or income tax to the extent of twelve months' arrears. This claim, however, seems to be postponed to debtor's deathbed and funeral expenses and the wages of servants, so far as the funds of the debtor are unattached by Crown diligence (Burton, l. 6; Goudy, 543).

Formerly, the Sanctuary afforded the Crown debtor no protection against personal diligence (Ersk. iv. 3. 25): and although imprisonment for debt is in the ordinary case abolished, it is still competent for the payment (*inter alia*) of taxes, fines, or penalties due to Her Majesty (43 & 44 Viet. c. 34, s. 4).

The interest of the Crown is not affected by the neglect or omission of its officials (*Lord Advocate*, 1884, 11 R. 1046; *Meiklam*, 1860, 22 D. 1427). But in any action an award of expenses may be pronounced either in favour of or against the Crown (18 & 19 Viet. c. 90; 19 & 20 Viet. c. 56, s. 24; Bell, *Com.* i. 781, ii. 40, 462; *Prin.* ss. 1241, 1247, 2291; More, *Notes to Stair*, 85).

**Crown Lands.**—Crown lands—the patrimonial property of the sovereign—afford, along with the udal estates in Orkney and Shetland, the only examples in Scotland of allodial property, *i.e.* land held of no superior. All other estates are held under feudal superiors, and ultimately under the sovereign, from whom all grants of land originally come. Crown property is of two kinds. It consists, first, of rights reserved to the Crown; and secondly, of the patrimonial estate of the sovereign. Under the head of reserved rights are included rights of gold and silver mines, right of forestry, and rights of fishing for salmon. Minerals under the sea, mussel-beds and oyster-beds, *maritima incrementa*, and flotsam and jetsam, also belong to the Crown (*Smith*, 1846, 8 D. 722; *Gammell*, 3 Macq. 419; *D. of Sutherland*, 1868, 6 M. 199; *Gunn*, 11 H. L. 192; *D. of Cornwall*, L. R. 2 Ex. D. 156; *Lord Advocate*, 1891, 19 R. 174; see also under REGALIA). The patrimonial estate of the sovereign includes lands, castles, strongholds, and palaces, and also the principality of Scotland, which effeirs to the eldest son of the sovereign, and failing a son, then to the sovereign himself *jure coronæ* (*Menzies, Conveyancing*, 516; *Bell, Prin.* 667–674).

It follows, from the nature of Crown rights, that the title to such property is not instructed in the ordinary way. As the Crown holds of no over-superior, infeftment (sasine or its modern equivalents) is unnecessary to the completion of Crown rights. Hence where a vassal's estate falls to the Crown by forfeiture, it becomes consolidated *ipso jure* with the superiority (*Menzies*, 808). In the case, however, of the Crown succeeding to a feudal right, service is necessary; but the retour to Chancery establishes a perfect right to the lands.

The management of Crown lands—excluding the private estates of the sovereign—was intrusted to the Woods and Forests Department by 2 & 3 Will. IV. c. 112; 3 & 4 Will. IV. c. 69, ss. 2, 3; and see 14 & 15 Vict. c. 42, ss. 1 and 2. The powers of the English Act 1829 (10 Geo. IV. c. 50), as to dealing with Crown property, were extended to Scotland by 3 & 4 Will. IV. c. 69, s. 3. In virtue thereof, Crown leases for thirty-one years of subjects of any description, for sixty-one years of mines (other than gold and silver), and for ninety-nine years for building or garden ground, may be granted. The granting of leases of salmon fishings in the sea and estuaries within the three-mile limit is a source of considerable revenue to the Crown (see *Lorat*, 1868, 6 M. 330; *Stephen*, 1878, 6 R. 282). The management of the foreshore is now in the hands of the Board of Trade (29 & 30 Vict. c. 62, s. 7 *seq.*; *Rankine on Leases*, 28, 30).

The Crown may also acquire land, on lease or otherwise, through the Woods and Forests Commissioners. If the sovereign acquires the lease of a subject by forfeiture or succession, he transfers it by gift to a donatory (*Rankine, supra.* As to the private estate of the Crown, see 25 & 26 Vict. c. 37; 29 & 30 Vict. c. 62; 36 & 37 Vict. c. 36; 37 & 38 Vict. c. 94, s. 60; *Ersk. Inst.* ii. 3, ss. 14, 44; ii. 10. 19).

Crown lands are exempt from assessment under the Poor Law Acts (*The Advocate-General*, 1852, 14 D. 356). Only property in the occupation of the Crown, or of persons using it for behoof of the Crown, is exempt (*University of Edinburgh*, 1868, 6 M. (H. L.) 97). The exemption extends to imperial taxes (*Coomber*, 1883, 9 A. C. 61, overruling earlier case of *Clark*, 1880, 7 R. 1157). In practice, the Crown waives its claim to exemption (*Browne, Rating*, 441; *Guthrie Smith, Poor Law*, 122). The right of exemption enjoyed by the Crown is founded upon the doctrine that the Crown is not affected by Statutes unless specially mentioned therein. (See *Somerville*, 1893, 20 R. 1050, where it was held by a majority of the whole

Court that the Crown was not subject to the jurisdiction of the Edinburgh Dean of Guild Court, that Court having no jurisdiction over the Crown at common law, and there being nothing in the Edinburgh Municipal Statutes to show that the Crown had consented to submit to the jurisdiction of that Court. The opinion, however, was expressed by several of the judges in that case, that when the Crown acquires property in a burgh by purchase, it is bound by all local regulations regarding that property.) The rule that the Crown is not affected by Statutes unless specially named therein, applies only to Statutes passed since the Union, and not to Acts of the Scottish Parliament (*Mags. of Inverness*, 1856, 18 D. 366).

**Crown, Pleas of.**—By the ancient practice of Scotland, the Justiciar and his deutes had exclusive jurisdiction in the crimes of murder, robbery, rape, and fire-raising, which were accordingly called the four pleas of the Crown. After the establishment of the Court of Justiciary by 1672, c. 16, the Lords of Justiciary exercised a privative jurisdiction as to these crimes down to the year 1887. Hume points out, however (ii. 61), that the jurisdiction of the Lords of Justiciary was not completely privative as to all of these crimes. The Sheriff never seems to have exercised jurisdiction as to the crimes of robbery, rape, and fire-raising. In the case of murder, however, where the murderer was taken *red-hand*, or immediately after the fact, the Sheriff might try the case, provided sentence was pronounced within twenty-four hours of the commission of the crime. If this could not be accomplished, the Justice or his depute dealt with the case. The period for doing justice by the Sheriff on a *red-hand* murderer was subsequently extended from one day to three. No Sheriff, however, has taken cognisance of a charge for murder since last century.

The Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35) makes it competent for the Sheriff to take cognisance of any crime except treason, murder, and attempt to murder under 10 Geo. IV. c. 38. Sec. 56 of the Act of 1887 provides that: "It shall be lawful to indict in the Sheriff Court persons accused of the crime of uttering a forged document, or of the crime of robbery, or of the crime of wilful fire-raising, or of any of the crimes under the Acts of Parliament for the prevention of persons going armed by night for the destruction of game, which under these Acts can at present be indicted in the Court of Justiciary only, but nothing in this clause contained shall render bailable any of the crimes above set forth, which are not now bailable, or shall extend the powers of the Sheriff in regard to punishment."

**Cruelty (Conjugal).**—See JUDICIAL SEPARATION.

**Cruelty to Animals.**—By the common law of Scotland, hurting or injuring animals might be prosecuted as malicious mischief. Hume and Alison mention cases where persons were punished for various acts of cruelty to animals (Hume, i. 124; Alison, i. 450; Macdonald, 115). There were two Acts passed in the reign of James VI.—the Act of 1581, c. 110 ("against the shameful oppression of slaying and houching of oxen, horses, and other cattel"), and the Act 1587, c. 83. These Acts made the slaying or houghing of horses and oxen punishable with death. But they were passed merely to protect the property of the owners of the animals, especi-

ally during spring and harvest labour, when the horses and oxen were required for agricultural purposes. In England, cruelty to animals was not a common-law offence, but there were several Acts dealing with the subject—3 Geo. IV. c. 71; 3 Will. IV. c. 19; 5 & 6 Will. IV. c. 59. These Acts were repealed by the Cruelty to Animals Act of 1849.

*The Cruelty to Animals (Scotland) Act, 1850.*—The Act of 1849 did not apply to Scotland, but in the next year an Act, 13 & 14 Vict. c. 92, was passed, intituled “An Act for the More Effectual Prevention of Cruelty to Animals in Scotland,” or, according to its shorter title, given by 55 & 56 Vict. c. 10, the “Cruelty to Animals (Scotland) Act, 1850.” It was an Act to prevent “wanton cruelty in the treatment of horses, cattle, and other domestic animals in Scotland.” By sec. 1 any person who cruelly beats, ill-treats, over-drives, abuses, or tortures, or causes or procures to be cruelly beaten, ill-treated, over-driven, abused, or tortured any animal, is liable for each offence in a penalty not exceeding £5. By sec. 2 any person keeping, or using, or acting in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether domestic or wild, is liable in a penalty not exceeding £5 for every day during which he keeps, uses, or manages such place. The same penalty is imposed on any person who suffers any place to be used as above. Any person receiving money for the admission of any other person to such a place is deemed to be the keeper thereof. Any person encouraging, aiding, or assisting at the fighting or baiting of any of the above-mentioned animals is also liable in a penalty not exceeding £5. By sec. 3 any person keeping or using a house or place for the purpose of slaughtering or killing horses or other animals (which are not intended for butcher’s meat) must take out a licence for that purpose. This licence is to be granted by the Sheriff of the county, on being satisfied that the person applying is a proper person for keeping such house or place. Persons having a licence must affix over the gate or door of their premises a board with their names and the words “licensed for slaughtering horses.” Penalty for failure, £5, and a further penalty of £5 for every day during which such board is not affixed. By sec. 4 every person keeping or using such a place for slaughtering horses, etc., must enter in a book a description of the colour, marks, and gender of every horse or other cattle received for slaughtering. This book must be produced, if required, before any magistrate, and may be inspected by any constable or person authorised by the magistrate. Penalty for not keeping the book, or for refusing to allow it to be examined, forty shillings for each offence. By sec. 5 it is not lawful for any person licensed to slaughter horses to hold at the same time a licence as a horse dealer. By sec. 6 any constable who has seen an offence committed against this Act, or has received information as to an offence from any other person who declares his or her name and place of abode to the said constable, is entitled to apprehend the offender by the authority of this Act, and forthwith, without any other authority or warrant, to convey such offender before a magistrate. By sec. 7 every complaint under this Act must be made within one month after the cause of the complaint arises. The complaint may be tried as a summary criminal case by any sheriff, or may be disposed of summarily by justices of the peace or other magistrates. By sec. 8 any magistrate convicting under the Act may, instead of imposing a pecuniary penalty, order the offender to be imprisoned for any time not exceeding three calendar months. If a fine which has been imposed is not immediately paid, the magistrate may appoint a time before which payment must be made, and, failing payment, may adjudge the offender to be imprisoned for

any time not exceeding two calendar months, unless payment be made sooner. By sec. 9 when any person having charge of a vehicle or animal is taken into custody for an offence against the Act, a constable may take charge of the vehicle or animal, and deposit the same in a place of safe custody, as a security for payment of penalty, and of expenses which may be incurred for taking charge of and keeping the said vehicle or animal. The magistrate before whom the case is heard may order the vehicle or animal to be sold for the purpose of satisfying the penalty imposed, and reasonable expenses in default of payment. By sec. 10 no action can be brought against any magistrate or other person for anything done in pursuance or under the authority of this Act unless such action is commenced within two months after the fact committed. Notice and particulars of such action must be given to the defender at least a month before the action is commenced. By sec. 11 the word "animal" is defined as meaning any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal. The word "over-drive" also signifies over-ride. By sec. 12 nothing contained in this Act shall prevent a person offending against it from being prosecuted and punished at common law or under any other Statute.

*Cases as to what Animals come under the Definition.*—It was held that a cock did not fall within the definition of animal given in sec. 11, and that therefore cruelty to a cock was not an offence under sec. 1 of the above-mentioned Act (*Johnstone*, 1892, 20 R. (J. C.) 37). The result of that decision was that cock-fighting was not illegal unless it was carried on in a place kept for the purpose. But an Act dealing with the subject was passed in 1895. 58 Vict. c. 13 provided that the definition of the word "animal" in sec. 11 of 13 & 14 Vict. c. 92, should be amended by adding at the end thereof the words, "or any game or fighting cock, or other domestic fowl or bird," and that every person who should in any manner encourage, aid, or assist at any cock-fight, whether in a place kept for that purpose or otherwise, should be guilty of an offence under the said Act. By the English Cruelty to Animals Act, 1849, the definition of animal is the same as in the Scotch Act of 1850; but that definition was amended by sec. 3 of 17 & 18 Vict. c. 60, which enacted that "animal" should mean any domestic animal, whether of the kind or species enumerated in the principal Act or of any other kind or species whatever, and whether a quadruped or not. It has been held that rabbits (*Aplin*, 1893, 2 Q. B. 57), tame sea-gulls (*Yates*, 1896, 1 Q. B. 167), performing lions kept in a cage (*Harper*, 1894, 2 Q. B. 319), are not domestic animals within the meaning of these Acts. Linnets kept in a state of captivity and trained as decoy birds, for the purpose of bird-catching, were held to be domestic animals within the meaning of these Acts (*Colam*, 1883, 12 Q. B. D. 66).

*Cases as to what Amounts to Cruelty.*—It has been held in Scotland that dishorning of cattle by sawing off their horns close to the skull is not an offence against sec. 1 of the Cruelty to Animals (Scotland) Act, 1850. It was proved that the operation caused great pain to the animals operated upon, but that the operation had been skilfully performed, and that its effect was to prevent the cattle from injuring each other when fed in courts. It was also proved that the practice was in common use over a large district in Scotland (*Todrick*, 1891, 18 R. (J. C.) 41; *Renton*, 1888, 15 R. (J. C.) 84). In England, it has been held that the operation of dishorning caused extreme pain, without adequate and reasonable object, and was unnecessary abuse of the animal, and amounted to a contravention of sec. 2 of 12 & 13 Vict. c. 92. That section is the same as sec. 1 of the Scotch Act of 1850 (*Ford*, 1889, 23

Q. B. D. 203). It has also been held in England, that a person who performs with reasonable care and skill a painful operation on an animal for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of an offence against sec. 2 of 12 & 13 Vict. c. 92, even though the operation is in fact unnecessary and useless. The operation performed was spaying or cutting out the uterus and ovaries of sows (*Lewis*, 1887, 18 Q. B. D. 532). Cutting cocks' combs was held to be a contravention of the above-mentioned section (*Murphy*, 1876, 2 Ex. D. 307). A person was walking with two small dogs. A large dog attacked the other two. The owner of the small dogs tried to pull the big one away from them, but having failed to do so, struck it twice with a knife, thereby inflicting two wounds, of which the dog died next day. It was held that his conduct did not amount to wanton cruelty within the meaning of sec. 1 of the Act (*Cornelius*, 1880, 7 R. (J. C.) 13). A conviction was quashed in a case where a person had been convicted under sec. 1 of the Act for firing from a distance of five yards at a dog which had been trespassing after game in a field belonging to the employer of the accused (*Jack*, 1880, 8 R. (J. C.) 1). A complaint under the Act, which set forth that the panel, a cab-driver, did cruelly ill-treat a horse under his charge by allowing it to remain yoked to his cab on a country road during a night in October, said horse suffering severely from hunger, cold, and exposure, was held relevantly libelled (*dis*s. Lord Young) (*Anderson*, 1881, 9 R. (J. C.) 6). An innkeeper's servant drove a pair of horses several journeys (in all about twenty miles) in a waggonette which held nineteen people. One of the horses showed signs of distress, and the innkeeper ordered it to be changed to another waggonette holding twenty-four people, and which was drawn by three horses. The horse fell dead in the street after it had run nine miles in the second waggonette. It was held that the innkeeper was rightly convicted of cruelty to animals by over-driving (*Carmichael*, 1887, 1 White, 333).

*Amount of Personal Knowledge to be Proved against a Person Accused under the Act.*—In a case where the owner of a horse was convicted under sec. 1 of the Act of 1850, for causing the horse to draw a cart when it was unfit to be worked, from having an open sore beneath the saddle, the conviction was set aside, because it was not proven that the accused had any knowledge of the condition of the horse at the time. It was being worked by the accused's servant at a place some miles distant from the residence of the accused (*Wright*, 1890, 17 R. (J. C.) 29). On the other hand, a complaint against a butcher for contravention of the Act, which set forth that at a place where he conducted part of his business, and which was in the immediate neighbourhood of his residence, he ill-treated cattle, or caused or procured them to be ill-treated, by leaving them without food, was held relevant although it did not set forth personal knowledge of the facts complained of (*Wilson*, 1874, 1 R. (J. C.) 16). In an earlier case, where a person was charged with a contravention of the Act of a similar nature, the complaint was held irrelevant, in so far as there was no averment of knowledge on the part of the accused that the supply of food provided for sheep was insufficient (*Sharp*, 1872, 2 Coup. 273).

*Dogs must not be Used for Purpose of Draught.*—By 17 & 18 Vict. c. 60, s. 2, any person who, on any public highway in any part of the United Kingdom, uses any dog for the purpose of drawing or helping to draw any cart, carriage, truck, or barrow, is liable to a penalty not exceeding 40 shillings for the first offence, and not exceeding £5 for the second and every subsequent offence.

*Vivisection.*—*Cruelty to Animals Act*, 1876 (39 & 40 Vict. c. 77).—Prior



to 1876, there had been no law to regulate the practice of vivisection of animals for the purpose of scientific and medical research, but in that year an Act was passed which proceeded on the preamble that it is expedient to amend the law relating to cruelty to animals by extending it to the cases of animals which, for medical, physiological, or other scientific purposes, are subjected when alive to experiments calculated to inflict pain. Sec. 2 prohibits painful experiments on animals, except subject to the restrictions imposed by this Act. Any person performing or taking part in performing any experiment calculated to give pain, in contravention of this Act, is liable to a penalty not exceeding £50 for the first offence, and for the second or any subsequent offence a penalty not exceeding £100 or imprisonment for a period not exceeding three months. Sec. 3 lays down the following restrictions as to performance of painful experiments on animals:—

(1) The experiment must be performed with a view to the advancement by new discovery of physiological knowledge, or of knowledge which will be useful for saving or prolonging life or alleviating suffering; and (2) the experiment must be performed by a person holding such licence from one of Her Majesty's Principal Secretaries of State, in this Act referred to as the Secretary of State, as is in this Act mentioned, and in the case of a person holding such conditional licence as is hereinafter mentioned, or of experiments performed for the purpose of instruction in a registered place; and (3) the animal must during the whole of the experiment be under the influence of some anæsthetic of sufficient power to prevent the animal feeling pain; and (4) the animal must, if the pain is likely to continue after the effect of the anæsthetic has ceased, or if any serious injury has been inflicted on the animal, be killed before it recovers from the influence of the anæsthetic which has been administered; and (5) the experiment shall not be performed as an illustration of lectures in medical schools, hospitals, colleges, or elsewhere; and (6) the experiment shall not be performed for the purpose of attaining manual skill. Provided as follows, that is to say: (1) Experiments may be performed under the foregoing provisions as to the use of anæsthetics by a person giving illustrations of lectures in medical schools, hospitals, colleges, or elsewhere, on such certificate being given as in this Act mentioned that the proposed experiments are absolutely necessary for the due instruction of the persons to whom such lectures are given, with a view to their acquiring physiological knowledge, or knowledge which will be useful to them for saving or prolonging life or alleviating suffering; and (2) experiments may be performed without anæsthetics on such certificate being given as in this Act mentioned that insensibility cannot be produced without necessarily frustrating the object of such experiments; and (3) experiments may be performed without the person who performed such experiments being under an obligation to cause the animal on which any such experiment is performed to be killed before it recovers from the influence of the anæsthetic, on such certificate being given as in this Act mentioned that the so killing the animal would necessarily frustrate the object of the experiment, and provided that the animal be killed as soon as such object has been attained; and (4) experiments may be performed not directly for the advancement by new discovery of physiological knowledge, or of knowledge which will be useful for saving or prolonging life or alleviating suffering, but for the purpose of testing a particular former discovery alleged to have been made for the advancement of such knowledge as last aforesaid, on such certificate being given as is in this Act mentioned that such testing is absolutely necessary for the effectual

advancement of such knowledge. Sec. 5 enacts that, notwithstanding anything in this Act contained, an experiment calculated to give pain shall not be performed without anaesthetics on a dog or cat, except on such certificate being given as in this Act mentioned, stating, in addition to the statements hereinbefore required to be made in such certificate, that for reasons specified in the certificate the object of the experiment will be necessarily frustrated unless it is performed on an animal similar in construction and habits to a cat or dog, and no other animal is available for such experiment; and an experiment calculated to give pain shall not be performed on any horse, ass, or mule, except on such certificate being given as in this Act mentioned that the object of the experiment will be necessarily frustrated unless it is performed on a horse, ass, or mule, and that no other animal is available for such experiment. Sec. 6 prohibits absolutely any public exhibition of painful experiments on animals, under a penalty not exceeding £50 for the first offence, and not exceeding £100 or imprisonment for a period not exceeding three months for the second offence. Any person publishing an advertisement of any such intended exhibition is liable to a penalty not exceeding £1. A person punished for an offence under this section is not for the same offence punishable under any other section of this Act. Secs. 7 to 11 provide for the granting of licences to perform experiments upon animals; for registering places where such experiments may be performed; and for reports to and inspections by order of the Secretary of State. Sec. 12 grants power to a judge to grant a licence for experiments on living animals in any case where he is satisfied that it is essential for the purposes of justice in a criminal case to make any such experiments. In Scotland, offences against this Act may be prosecuted and penalties recovered under the provisions of the Summary Procedure Act of 1864, but a person accused of an offence in respect of which he would be liable to a penalty of more than £5 may object to be tried before a Court of summary jurisdiction, in which case proceedings may be taken against him on indictment before the High Court of Justiciary in Edinburgh, or the Circuit Court. Sec. 21 provides that no prosecution against a licensed person shall be instituted except with the assent in writing of the Secretary of State. Sec. 22 provides that the Act shall not apply to invertebrate animals. This Act has not been the subject of decision either in the High Court of Justiciary or in the Queen's Bench Division in England.

*The Cruelty to Animals (Scotland) Act, 1895* (58 Vict. c. 13).—This Act was passed to prevent cock-fighting. Its provisions are given above in dealing with the question as to what animals are domestic animals in the sense of the Act of 1850.

**Cruelty to Children.**—Certain forms of cruelty to children are offences punishable at common law. To expose or desert an infant is itself criminal, and it is unnecessary to libel or prove actual injury (Hume, i. 299; Alison, i. 162). If injury does result, it is an aggravation; and if death is caused, the offence may amount to culpable homicide, or even to murder (*Kerr*, 1860, 3 Irv. 645). It is a crime to place a child in circumstances of danger to its life, although there is no intention to desert it, as where a child was sent by its mother in a basket by rail, without placing it under the charge of anyone, and without informing the railway officials of the contents of the parcel (*Gibson*, 1845, 2 Broun, 366). The punishment is imprisonment or penal servitude.

The insufficiency of the common law has led to the passing of several Statutes for the further protection of children. The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), repealed the earlier measures, but consolidated and re-enacted their provisions. This Act, while not affecting the right of parents and guardians to administer punishment (s. 24), makes anxious provision for the prevention of ill-treatment.

*Offences.*—The leading offence—called an “offence of cruelty” (s. 1 (5))—is committed by anyone above the age of sixteen who, having the custody, charge, or care of a child under sixteen, “wilfully assaults, ill-treats, neglects, abandons, or exposes such child,” or causes or procures the same, in a manner likely to cause it unnecessary suffering, or injury to its health, including bodily injury or mental derangement. On conviction on *indictment*, the offender is liable to a fine not exceeding £100, with the alternative or additional punishment of imprisonment, with or without hard labour, for a period not exceeding two years. Where the offender has a pecuniary interest in the death of the child, and knew of this interest, the Court may, in its discretion, increase the fine to £200, or, in place of any other penalty, award a sentence of penal servitude for any term up to five years. On conviction before a *summary* Court, the maximum fine is £25, and the maximum period of imprisonment, alternative or additional to the fine, is six months, with or without hard labour. The child’s death does not prevent a conviction under this section, either summarily or on indictment (s. 1).

Certain restrictions are also placed on the employment of children. The Act prohibits anyone from causing, and persons having the custody, charge or care, from allowing, (1) a boy under fourteen, or a girl under sixteen, to be in any street, premises or place, for the purpose of begging, whether under pretence of singing, playing, performing, selling, or otherwise; (2) a child of that age to be in any street or licensed drink premises, not being premises licensed for entertainments, for the purpose of singing, playing, performing for profit, or selling, between 9 P.M. and 6 A.M.; provided that these hours may be extended or restricted from time to time by bye-law of the local authority (as defined in s. 26); (3) a child under eleven to be at any time in any street or in premises licensed for drink or for public entertainments, or in a place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, performing for profit, or selling; or (4) a child under sixteen to be in any place for the purpose of being trained to any acrobatic or other dangerous performance—a provision which, however, does not apply where the child’s parent or legal guardian is himself the trainer. An offence against these prohibitions is punishable on *summary* conviction with a fine not exceeding £25, or alternatively, or in addition thereto, imprisonment for any term up to three months, with or without hard labour. These provisions do not apply to occasional sales or entertainments for charitable purposes, though where the sale or entertainment is to be held in premises licensed for the sale of drink and not for public entertainments, a special exemption is required (s. 2). The School Board is empowered to grant a licence, on such conditions as it sees fit, for the employment of children above the age of seven in public entertainments, or for training them to acrobatic or other performances, provided the Board is satisfied of the fitness of the children and of the sufficiency of the provision made for their health and kind treatment. Applicants for such licence must give seven days’ notice to the chief officer of police in the district, who may appear and object: and they must within ten days after the licence is granted send a copy of it to the local inspector

of factories and workshops, on pain of a fine not exceeding £5. Inspectors under the Factory and Workshop Act, 1878, may be required by the Secretary for Scotland to see whether the conditions of such licence are duly fulfilled (s. 3).

The Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34), may also be here referred to, which provides that anyone causing a child under the age of fourteen to take part in a public exhibition or performance of a dangerous character, and a parent or guardian aiding and abetting, shall be liable on summary conviction to a fine not exceeding £10. Where an accident causing bodily harm occurs to a child so employed, the employer may be charged with assault, and the Court, on conviction, may award the child damages against him, to an amount not exceeding £20.

*Arrest of Offender and Disposal of Children.*—The powers given by the Prevention of Cruelty to Children Act, relating to the arrest of offenders and the safety of children, apply also to certain other offences specified in a schedule appended to the Act. These include offences under the Children's Dangerous Performances Act, 1879, and "any other offence involving bodily injury to a child under the age of sixteen years" (sched.).

The Sheriff or Sheriff-Substitute may, on sworn information of ill-treatment, or of the commission of any of the offences scheduled, towards a child under sixteen, issue a warrant authorising a superior officer of police to apprehend the accused, to search for the child, and, if the complaint is well founded, to remove the child temporarily to a place of safety (s. 10). A person committing an "offence of cruelty" or any of the offences scheduled, may, if he is likely to abscond, or if his name and address are not known or ascertainable, be apprehended by a constable *without warrant*, and may be admitted to bail by the officer in charge of the police station to which he is taken (s. 4). Where any of these offences has been committed, or an offence under the prohibition against employing children to beg, a constable may take the child to a temporary place of safety. In the case of a child so removed, or one removed under a warrant, an order may be made by the Summary Court for its care and detention until the charge against the accused has been determined, or until a reasonable time has elapsed (ss. 5 and 10). A child under sixteen may, on the conviction or committal for trial of a person having charge or control of it, be removed by order of the Court, after inquiry, and committed to the custody of a relation or other person who may be willing and suitable, until the child attains the age of sixteen, or for a shorter period; provided that no such order is to be made unless a parent (or guardian) has been convicted, or committed for trial, or bound over to keep the peace towards the child (s. 6). The Court, in selecting the guardian, is, if possible, to have regard to the child's religious persuasion (s. 8). The person intrusted with the custody has the same powers of control and the same obligations for maintenance as if he were the child's parent, and the Court has power to order the parent to contribute to the child's maintenance. (For special powers of the Court where the parent is a habitual drunkard, see DRUNKARDS, HABITUAL.)

*Procedure, etc.*—The Court of Summary Jurisdiction for the purposes of the Act is, in Scotland, the Sheriff or Sheriff-Substitute (s. 26), and appeals are allowed to the High Court of Justiciary (s. 19). A summary conviction is not competent unless the offence was committed wholly or partly within six months before the complaint was made (s. 18). The accused and the accused's wife or husband are competent, but not compellable, witnesses (s. 12). Provision is made for taking the child's deposition on oath where

necessary owing to its state of health, and for proceeding without its attendance in Court (ss. 13 and 16). The Parochial Board (now the Parish Council) is empowered to pay, out of the funds under their control, the reasonable costs of proceedings taken under the Act by their direction in regard to the assault, ill-treatment, neglect, abandonment, or exposure of any child (s. 21).

**Cruives and Zaires.**—A cruive is a contrivance placed on a river for the purpose of catching salmon. It either is placed beside a dam or has stone walls built across the river on either side of it. The trap itself is made of spars, stakes, or wickerwork. The following description of a cruive is taken from the pleadings in the House of Lords (*Halkerton v. Scott*, 1769, Mor. 14276):—"A strong wall is built across the river, called the cruive-dyke. The side which fronts the stream is nearly perpendicular, the lower side is built with an easy slope. In the wall certain openings or gaps are left in which are placed the engines for catching the fish, called the cruive-boxes, and which are so constructed as to serve the purpose of catching fish of proper size, but also of suffering small fish and fry to pass through. For this purpose the two ends of the cruive-boxes are made with hecks or racks of a certain wideness, and the hecks at the upper end, which receive the stream, are all immoveable, except so many of them as are made to draw out by making an opening of an ell wide, which is done from sunset Saturday till sunrise Monday, called Saturday slop. The racks or hecks at the lower end are like two folding doors placed angularly towards each other and sloping into the cruive-box, where they are sharpened at the points, and stand three inches asunder. These are so constructed as to yield on the smallest pressure, in order to let into the cruive the largest fish ascending the river, but prevent them from getting back by the sharpness of the points, and being shut by the force of the stream. These lowest hecks are called the inscales." (House of Lords Appeal Papers, 1772.)

Cruives are now the only stationary engines which can be legally used for salmon fishing. They may not be placed in any part of a river where the tide is perceptible at its highest point, and neither prescriptive possession nor an expressed grant from the Crown will justify their use in such a position (*Mackenzie*, 1840, 2 D. 1078). This and other regulations as to cruives were laid down by a series of Statutes, the earliest of which is Robert I. 1318, c. 12. There are many statutory enactments (1424, c. 11; 1477, c. 73; 1489, c. 15; 1563, c. 68; 1581, c. 111; 1685, c. 20) and old decisions as to the construction and use of cruives, but these Acts and decisions need not be referred to in detail, as the Salmon Fisheries Act of 1862 empowered the Fishery Commissioners to issue new regulations as to the construction and use of cruives (25 & 26 Vict. c. 97, s. 6). A series of bye-laws dealing with the subject was issued by the Commissioners in 1865, and is still in force. These bye-laws will be found in Schedule F of 31 & 32 Vict. c. 123. They contain minute directions as to the construction of the cruive. The heck or rails and inscales are to be removed during the annual close-time; and the hecks or rails are to be removed, and the inscales are either to be removed or kept open for the space of four feet, during the weekly close-time (or Saturday's slop, as it was originally called in the Act 1477, c. 73, re-enacted by 9 Geo. IV. c. 39). No cruive is to be constructed in such a way as to prevent persons duly authorised from inspecting it, and ascertaining whether the law is being duly complied with. No cruive can be altered so as to create a greater obstruction to the free

passage of fish than at present exists. The Act of 1862, which empowered the Commissioners to issue these regulations, contains the following proviso:—"Provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under any royal grant or charter, or possessed for time immemorial." A question as to how far the power of the Commissioners was limited by this proviso was considered in a recent case. The Court of Session in 1774 had pronounced a decree in regard to the width of the cruives belonging to the Earl of Fife in the river Deveron. By that decree the width had been fixed at thirty-seven inches. The regulations of the Commissioners required that the width should be four feet. The Duke of Fife contended that he was entitled to have his cruives of the same width as before, and relied on the proviso in the Act and on the former decrees of the Court. The Fishery Board maintained that the Duke was bound to alter his cruives so as to bring them into conformity with the regulations. There was nothing as to the width of the cruives in the Duke's charters. It was held that the former decrees were merely of a regulative character, and conferred no immunity, and did not denote any right of the character which is safeguarded by the proviso in the Act of 1862. The proviso was intended to protect existing rights of fishing, not to prevent new regulations being passed to modify or alter existing regulations as to the mode and manner in which the right might be exercised (*Duke of Fife*, 1897, 4 S. L. T. 429). By sec. 28 of the Act of 1868, the District Board and its officers, or any police officer, has a right to examine a cruive in his district. By sec. 13 of the same Act, the District Board has power by agreement to purchase, for the purpose of removing it, any cruive which they may deem it expedient to remove for the benefit of the fisheries in their district. The power of purchase cannot be exercised by the District Board unless with the consent of the proprietors representing four-fifths in value of the fishings on the roll in the district.

The right to fish by means of cruives is not conferred by a general grant of salmon fishing. It may be acquired by a special grant of cruive fishing, or by possession of cruive fishing for the prescriptive period following upon a general grant of salmon fishing, or upon a Crown charter conveying lands *cum piscationibus* (*Johnstone*, 1799, 4 Pat. App. 274; *Mays of Inverness*, 1775, Mor. 14257). The right to fish by cruives will be strictly confined to such cruive fishing as has been possessed for the prescriptive period (*Heritors of Don*, 1665, Mor. 10840; per Ld. Blackburn in *Lovat*, 1880, 7 R. (H. L.) 164). It is doubted whether, where a general right to salmon fishings has been conveyed, the Crown can thereafter grant a right of fishing by cruives in the same river. In one case an objection that such a grant of cruive fishing was *ultra vires* of the sovereign, was repelled (*Duke of Gordon*, 1778, Mor. 14297, 3 Pat. 679; but see *Duke of Argyll*, 1891, 18 R. 1108, per Ld. Rutherford Clark). The Court refused to forbid cruive fishing in a river on the ground that it interfered with the right of the upper heritors to float timber down the river, but made regulations by which the rights of the upper heritors and the grantee of the fishing might both be exercised (*Duke of Gordon*, 1781, Mor. 12820).

Zaires, otherwise called yairs, weirs, or fish dams, are not now in use in fresh waters. A zaire was an enclosure the walls of which were made of stone, wood, or wickerwork. Fish enter it by an entry which is wide at the open side and narrow in the interior; and fish having once got inside, have great difficulty in finding the small exit. The right to fish for white fish by means of zaires does not allow the proprietor to use them for taking

salmon (*Fraser*, 1829, 8 S. 14); nor can they be used in tidal waters (*Maackenzie*, 1840, 2 D. 1078).

[Rankine on *Landownership*, 3rd ed., pp. 252, 274, 276, 287; Stair, ii. 3. s. 70; Ersk. ii. 6. s. 15; Bell, *Prin.* s. 1116; Stewart on *Fishing*.]

See FISHING.

**Culpa.**—Fault.—An expression used in the law of Scotland in connection with a wrong independent of contract, and also in connection with contract. In cases of civil delict, *culpa* is now regarded as synonymous with negligence, which (*Faulds*, 1861, 23 D. 437) describes a breach of a duty which the circumstances of the case impose. The standard of care is that which an ordinarily prudent man would observe in his own affairs. At one time an attempt was made to divide *culpa* into three degrees: (1) *lata, quæ dolo æquiparatur*; (2) *levis*, an intermediate degree, corresponding practically with a breach of the standard above mentioned; and (3) *levissima*, or slightest fault. The distinction between the last two has, however, been finally abandoned in Scots law (*Macintosh*, 1864, 2 M. 1357); and it has been much questioned if the distinction ever obtained in Roman law (*Maackenzie*, *Roman Law*, 208). With regard to the first two, the view now taken is, that if there is *culpa* there is liability; and whether there has been fault, depends on the nature of the duty incumbent on the alleged wrongdoer. The distinction still survives, however, to the effect of rendering a trustee liable in penal interest for funds lost through wilful mismanagement; whereas if they are lost merely through indiscretion, he will be liable only in such interest as the funds would have yielded (*McLaren* on *Wills*, ii. 12–15).

In the domain of contract, the amount of diligence required, failure to observe which is *culpa*, is also a question of circumstances, depending on the nature of the contract (*Gibbin*, 1868, L. R. 2 P. C. 318). Of a lawyer or doctor it is said, *spondet peritiam artis*, which means that he undertakes to give the skill of an ordinary man in his profession, and that he is not liable for a mere mistake (*Landell*, 1845, 4 Bell's App. 46). In a contract of carriage of passengers, on the other hand, the duty of the lessor of a vehicle and horses is said to be to take all the care possible to secure safety (*Hyman*, 1881, L. R. 6 Q. B. D. 687). The question always is, What is the implied obligation in the contract? and that question must be decided upon a construction of each contract. It has been accepted, however, as a general rule, following the Roman law, that greater diligence is expected of one who is benefited by a contract, and less from him who reaps none; and that where both parties are equally benefited, the same diligence is required from each (*Maackenzie*, p. 210).

**Culpa tenet suos auctores.**—Liability for fault attaches only to its author.—A maxim in the law of delict, distinguishing it from contract, in which latter a person is liable not only for his own acts but for those of his agent. Authority to act for another person does not, with the important exception of the case of MASTER AND SERVANT (*which see*), involve that person in liability for delict committed by the person authorised. There is no representation in delict. A husband, for instance, is not liable for a wrong committed by his wife (*Mullen*, 1881, 18 S. L. R. 493); nor one party, contributing to the production of a nuisance, for the contribution of other parties (*Cowan*, 1876, 4 R. (H. of L.) 14). But if the party

sought to be held liable has authorised another to do the wrongful act, then the law holds the injurious act to be his act.

*Liability of Employer for Contractor.*—The general rule is that an employer is not liable for the wrongful act of a contractor to whom he has delegated the execution of work (*Stephen*, 1876, 3 R. 535). This rule, however, is subject to two exceptions, viz.: (1) when the employer retains control of the work: (2) when the work is necessarily of a hazardous character, although carefully carried out.

(1) Where an employer retains control of the work, and a contractor merely carries out his instructions, and in so doing causes damage, the wrongful act is truly that of the employer, though the hand doing it is that of the contractor (*Bower*, 1876, L. R. 1 Q. B. D. 321; *Stephen*, *supra*). Thus where an employer caused a contractor to work at night in altering a building, part of which was occupied by pursuer as a hotel-keeper, and pursuer's trade was injured by the disturbance (*Miller*, 1885, 13 R. 309); where an employer did not take care to see that the demolition of a building was effected so as not to injure, by the dust and lime sent into the air, an adjoining shop (*Cameron*, 1881, 9 R. 26); where an employer, being informed that the contractor had placed a heap of gravel on the roadway, allowed it to remain there (*Burgess*, 1845, 1 C. B. 578); where an employer caused a contractor to open up streets for which the employer had no authority (*Ellis*, 1853, 2 El. & Bl. 767)—the employer was held liable. After a contractor has finished the work, and his employer has taken it off his hands, an action will then lie against the employer (*M'Intyre*, 1883, 11 R. 64, Glegg, 251).

(2) A person who undertakes an operation on property necessarily hazardous to his neighbours, does not escape liability for damage caused by employing a contractor to do the work. Since it is the operation which in itself is dangerous, and not the manner of doing it, the injurious act is regarded as the act of the employer. In such a case an employer cannot escape liability, even by binding a contractor to take effectual precautions to prevent injury (*Dalton*, 1881, L. R. 6 A. C. 740, 791). Accordingly, an employer, who had taken a contractor so bound, was found liable for injury caused by the dangerous operation of taking down a gable and digging out foundations (*Bower*, 1876, L. R. 1 Q. B. D. 321). But where the work is of a simple kind, and not likely to cause damage if carried out with ordinary care, a person who delegates it entirely to a contractor is not liable if the contractor causes damage. If, for instance, a contractor causes damage in the safe operation of plastering a house, he, and not his employer, is liable (*M'Lean*, 1850, 12 D. 887).

A statutory obligation cannot be got rid of by delegating to a contractor the operations enjoined by Statute to be executed (*Gray*, 1864, 5 B. & S. 970). But where the Statute authorises delegation of the execution of the work it sanctions, it has been thought that the employment of a contractor, who is put in complete control of the work, will relieve the employer (*Stephen*, 1876, 3 R. 535): and in a question arising under the Tramways Act, in England, it was so held (*Alldred*, 1891, 2 Q. B. 398).

*Liability of Landlord for Tenant.*—A landlord is not liable for an injurious act of his tenant committed without his authority (*Collins*, 1837, 15 S. 903). A landlord has no legal implication in the act of his tenant beyond what the terms of the lease show; and where powers are given to the tenant, the landlord is entitled to assume that they will be exercised carefully, and not negligently. A landlord, letting a subject, confers only the legal use. Consequently a landlord was held not liable where his tenant negligently wrought a ferry (*Duncan*, 1877, 14 S. L. R. 603), built a dam (*Henderson*, 1818, 15 D.



868), deprived an inferior riparian proprietor of water (*Glasgow Magistrates*, 1825, 1 W. & S. 153), allowed a water-closet to overflow (*Weston*, 1839, 1 D. 1218), polluted a river in using a factory on the river bank (*Buccleuch*, 1866, 5 M. 219). Nor is the lessor of a moveable liable for the use the lessee makes of it (*Smith*, 1891, L. R. 2 Q. B. 403; *Wilson*, 1887, 24 S. L. R. 541).

But a landlord is liable for letting his property for a purpose which necessarily causes a nuisance (*Duncan, supra*), and, the lease being silent, for authorising the carrying on of a nuisance (*Dunn*, 1837, 15 S. 853; *Collins*, 1837, 15 S. 895; Hunter, vol. ii. 560).

*Liability for Act of Third Party.*—An apparent exception to the rule, that one is not liable for the fault of another, is found in a class of cases where the proximate cause of an injury is the act of a person who has apparently no connection with him who first set a series of causes in motion. The principle of liability is that the first person is negligent in not foreseeing or guarding against the ultimate result of his own action. The typical case is where a person collects a crowd, whose movements he cannot control, and which are naturally apt to be injurious. The occupant of a recreation ground near a large town advertised a parachute descent thereat. A large crowd collected outside the recreation ground, and, on the parachute descending in a neighbouring field, rushed in, breaking down the fences and destroying the crop. An action at the instance of the injured farmer against the occupant of the recreation ground was held relevant (*Moss*, 1889, 17 R. 32). But if the act of the crowd, or third party, is not a natural and obvious result of the original act, there is no liability. Where, through the negligence of a railway company, an engine was overturned into plaintiff's flower garden, he was held not entitled to recover, as an item of damage, the injury done to his garden by members of the public who visited it to view the overturned engine (*Scholes*, 1870, 21 L. T. (N. S.) 835). Where, also, the original act has not been negligent, a defender is not liable for the supervening negligence (*Fairbanks*, 1872, 10 Amer. Rep. 664), and still less for the mischievous act of another (*Macgregor*, 1883, 10 R. 725).

The general rule, which relieves one of responsibility for the act of a third party, also debars one from pleading that his own fault would not have caused injury, unless for the negligent omission of a third party. One is not entitled to rely upon another stepping in to counteract the effect of his negligence. A dock owner, who supplied defective staging for immediate use to a shipowner, who in turn supplied it to a ship painter, who was injured by its collapse, was not allowed to plead, in an action by the ship painter against him, that the shipowner could and ought to have discovered and remedied the defect in the staging (*Heaven*, 1883, L. R. 11 Q. B. D. 503; *Edwards*, 1889, 16 R. 694). But it has in some cases been successfully pleaded that the acceptance of the article by the receiver, as conform to contract, terminates the liability of the person supplying it (*Campbell*, 1891, 19 R. 282).

**Culpable Homicide.**—Culpable homicide is one of the two branches of criminal homicide, murder being the other. In the former crime there is an absence of that wilful intent to kill or utter regardlessness of consequences which are present when the crime is that of murder. Cases of culpable homicide vary in character and circumstance from those which are barely distinguishable from murder to cases in which the *culpa* is of the most venial nature. There are three groups or classes into which all cases of culpable homicide may be divided:—

I. Where there is intent to kill, and the homicide is neither murder nor justifiable homicide.

Thus if a man kills another, after provocation, the crime is culpable homicide, and not murder. The provocation, however, must be serious. It is not enough that there are verbal insults, however gross. Nor may an assault by a slight blow be met by an attack which results in the death of the assailant. The law allows no more than retaliation in kind. If the retaliation is excessive, and out of proportion to the provocation, the ensuing homicide is of the first degree. Homicide in *chaude melle* falls under this category, it being assumed that in such a case there was due provocation. But it is only where a combat sprang up suddenly and was fought in hot blood that this rule applies. If a fight is deliberately arranged and carried out, as in a duel, then, if death ensues, the crime is murder (Hume, i. 247).

Killing in self-defence is justifiable homicide. If, however, the killing was unnecessary for self-defence, although there was ground for alarm, the crime is culpable homicide (Hume, i. 229; *Forrest*, 1837, 1 Swin. 404; Alison, i. 92; *Lane*, 1830, Bell, *Notes*, 77). If the person whose life is in danger has a means of escape and does not take advantage of it, but chooses to kill his adversary, or if he kills the other when the danger is over, the crime is culpable homicide. If one, by using insulting language or by making a slight assault on another, brings upon himself an attack and has to slay his assailant in self-defence, the killing is not justifiable, but culpable, owing to the initial conduct of the person who has killed (Hume, i. 233).

If a husband instantly kills his wife's seducer, when the couple are caught in the act of adultery, the crime is culpable homicide; but if the husband kills after an interval, and with deliberation, the crime is murder (Hume, i. 218; Alison, i. 102).

Public officials who have a duty to kill in certain circumstances may be guilty of culpable homicide, or even murder, if they kill rashly or unnecessarily (Hume, i. 216; Alison, i. 43, 110; Burnett, 77, 79).

Where there is mental weakness or disease not inferring complete irresponsibility, there is culpable homicide when the same crime, in a person of a sound mind, would be murder (*Ferguson*, 1881, 4 Coup. 552; *Thomson or Brown*, 1882, 4 Coup. 596; *Gove*, 1882, 4 Coup. 598; *Smith*, 1893, 1 Adam, 34).

II. Where there was no intent to kill, but death resulted from unlawful or careless conduct on the part of the accused.

It does not affect the charge that death was not a likely or probable result of the act which caused it, or was not contemplated by the accused (Hume, i. 234). The culpability may vary from the most outrageous assault to the slightest injury which terminates in a fatality (*Grace*, 1835, 1 Swin. 14 (fight with fists); *McRiner*, 1844, 2 Broun, 262 (assault); *McLaughlin*, 1845, 2 Broun, 387 (sudden blow in retaliation); *Brodie*, 1846, Ark. 45 (throwing down); *Vance*, 1849, J. Shaw, 211 (assault and throwing down); *Broadley*, 1884, 5 Coup. 490 (man drowned by being knocked into water in drunken brawl)). It is no defence to the charge of culpable homicide that the deceased had a weak constitution, or a weak heart (*Brown*, 1879, 4 Coup. 225).

It is not necessary that actual violence has been used towards the deceased, if death has resulted from rash or careless conduct. If a child is suffocated at birth owing to the mother having failed to obtain assistance, the crime is culpable homicide, and it is immaterial that she did not con-

ceal her pregnancy (*Martin*, 1877, 2 Coup. 379; *Scott*, 1892, 3 White, 240). If a child is deserted, and dies, the crime is at least culpable homicide (Hume, i. 235; Alison, i. 99). If spirits or drugs are administered even in frolic, and death is thereby caused, the crime is culpable homicide (Hume, i. 237; *Crawford*, 1847, Ark. 394; *Hamilton*, 1857, 2 Irv. 738).

If death results from the reckless use of firearms or explosive fireworks, or the like, there is culpable homicide (Hume, i. 192; *Wood and King*, 1842, 1 Broun, 262; *McBryde*, 1843, 1 Broun, 558; *Smith*, 1858, 3 Irv. 72).

If those who are in charge of young persons (*McGavin*, 1846, Ark. 67), or of infirm persons (*McManis* and *Higgins*, 1847, Ark. 321; *Fay*, 1847, Ark. 397), or paupers (*Hardie*, 1847, Ark. 247), so neglect or ill-treat them as to cause death, they are guilty of culpable homicide.

The injury inflicted, or act done rashly or carelessly, must be the cause of the death, but it is immaterial that death results only indirectly from the act done. Thus if a husband attacks his wife and she falls, and the child in her arms is killed, the husband is guilty of culpable homicide. So, too, if the child's death results from its being squeezed in the mother's arms owing to the husband's violence towards her (*Mitchell*, 1856, 2 Irv. 488). It is culpable homicide to flog the horse on which a person is riding, so that it runs off and kills him (*Keay*, 1837, 1 Swin. 543, Lord Moncreiff's opinion). Compelling children to leave a house in inclement weather, so that they perish from exposure, is culpable homicide (*Watt and Kerr*, 1868, 1 Coup. 123). Even if a person, in terror of the violence of another, does something which causes his death, the person using the violence is guilty of culpable homicide (Hume, i. 225, 236; *Robertson*, 1854, 1 Irv. 469). Thus where a woman, in order to escape men who intended to ravish her, ran off in the dark and fell over a precipice, her assailants were found guilty of culpable homicide (*Slaven & Others*, 1885, 5 Coup. 594).

III. Where homicide results from negligence or rashness in the performance of lawful duty.

Under this head there is culpable homicide where death ensues from circumstances which were not completely casual—where, in short, there is *culpa* (*Murray*, 1840, Bell, *Notes*, 77). If a person entitled to inflict corporal punishment exceeds moderation in doing so, and death results, this is culpable homicide (Hume, i. 237; *Paterson*, 1838, 2 Swin. 175; *Evans and Denwood*, 1873, 2 Coup. 410).

Rashness or carelessness on the part of drivers of vehicles (*e.g.* careless driving, or leaving the horses unattended to, or allowing an unskilled person to drive) which results in death, may found a charge of culpable homicide (Hume, i. 192; Alison, i. 118; *Gowans*, 1831, Bell, *Notes*, 70; *Stoddart*, 1836, Bell, *Notes*, 73; *Matheson*, 1837, Bell, *Notes*, 70; *McArthur*, 1841, Bell, *Notes*, 74; *Messon*, 1841, 2 Swin. 548; *Trotter*, 1842, Bell, *Notes*, 74; *Smith*, 1842, 1 Broun, 220; *Wood and King*, 1842, 1 Broun, 262; *Ross & Others*, 1847, Ark. 258; *Lonie*, 1862, 4 Irv. 204).

The carelessness of railway servants—drivers, pointsmen, signallmen, guards, stationmasters, porters, etc.—may amount to culpable homicide (see authorities in Macdonald, p. 137, note 1). Those who have charge of sailing vessels, steamers, or boats, may be charged with culpable homicide if, by their carelessness, life is lost either on board their own vessel or in other vessels (Hume, i. 193; *McAlister & Others*, 1837, 1 Swin. 587; *Sutherland*, 1838, Bell, *Notes*, 74; *McLean*, 1842, 1 Broun, 416; *Henderson & Others*, 1850, J. Shaw, 394; *McPherson and Stewart*, 1861, 4 Irv. 85; *Grasson and Drummond*, 1884, 5 Coup. 483). The same charge may be preferred against those who are responsible for machinery used in coal mines (*Rouatt*, 1852,

1 Irv. 79; *Stenhouse & Mackay*, 1852, 1 Irv. 94); or for the handling of dangerous materials (*Drysdale*, 1848, Ark. 440; *Auld*, 1856, 2 Irv. 459; *Clark*, 1877, 3 Coup. 472). Contractors carrying on works are criminally responsible for negligence and carelessness which result in loss of life (Hume, i. 192; *Kirkpatrick & Stewart*, 1840, Bell, *Notes*, 71; *McClure & Others*, 1848, Ark. 448; *Wilson*, 1852, 1 Irv. 84); and this includes failure on the part of the contractors to exercise proper superintendence over subordinates (*Kirkpatrick & Stewart*, *ut supra*; *Drysdale & Others*, 1848, Ark. 440).

An unqualified person who dispenses drugs which cause death is guilty of culpable homicide (*Wheatly*, 1853, 1 Irv. 225). The same charge was relevantly laid against a druggist who sold a poison by mistake for a harmless medicine (*Armitage*, 1885, 5 Coup. 675).

Homicide may result from the separate faults of several persons. When this is so, each is responsible, and they may all be indicted for the crime (*Gowans*, *ut supra*; *Ross & Others*, *ut supra*; *Henderson and Lawson*, 1842, 1 Broun. 360; *Drysdale & Others*, *ut supra*; *Hamilton and Hutchison*, 1874, 3 Coup. 19; *Little & Others*, 1883, 5 Coup. 259).

If there is fault, but this was not the cause of death, a charge of culpable homicide will not lie. Thus if an engine leaves the rails through no fault of the driver, he is not responsible for the death of a person whom he culpably allowed to ride on the engine (*Gray*, 1836, 1 Swin. 238). But if a death is due to an engine-driver's fault, it is no defence to the charge of culpable homicide that the person killed had no right to be on the train (*Laird*, 1833, 6 Sc. Jur. 42).

Obedience to orders does not exonerate a person charged with culpable homicide, if what he did was obviously dangerous (*Boyd*, 1842, 1 Broun. 7; *Paton and McNab*, 1845, 2 Broun. 525). Even adherence to the directions of bye-laws will not always free from responsibility (*Trotter*, *ut supra*). But violation of bye-laws is *prima facie* proof of culpability (*Houston and Ewing*, 1847, Ark. 252; *Auld*, *ut supra*).

*Indictment*.—The Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35, Sched. A.) gives this form: "You did, when acting as railway signalman, lower a danger-signal and allow a train to enter on a part of the line protected by the signals under your charge, and did cause a collision, and did kill William Peters, commercial traveller, of Brook Street, Carlisle, a passenger in said train."

*Punishment*.—The punishment varies from penal servitude or imprisonment in serious cases, to fine or a nominal sentence in cases where the culpability is slight (*A. B.*, 1887, 1 White, 532).

**Cum decimis inclusis** is a title with teinds included where lands are previously described and conveyed in the same writ. This was a common grant by Churchmen on the approach of the Reformation, although there was direct papal prohibition against alienating Church property. The words *et nunquam antea separatim*, or expressions of like import, were added, being an assertion—not always accurate—that the teinds had never before been separated from the stock. Titles of this description were founded on after the Reformation as conferring immunity from teinds, which involved the inquiry (1) whether the title had been granted by one of the privileged orders of Churchmen competent to grant it, (2) whether the statement that the teinds had never before been separated from the stock was true, and (3) whether the title had been confirmed by the pope before the Reformation,

or by the king before the Act of Annexation of 1587 (see Buchanan, 108 *et seq.* and 131). Where the title satisfied these conditions, there is complete immunity from teinds; but where the title is not sufficient to confer immunity, it is treated as conferring an heritable right to teinds, which are liable to be localled on for stipend along with the teinds of other heritors having heritable rights. After the Reformation, titulars were required to sell to the heritors the teinds of their lands at nine years' purchase, and if the teinds belonged to the titular *qua* patron, at six years' purchase. If the price is fixed under judicial proceedings, the heritor obtains a special title to the teinds on payment of the price fixed by the Court (see Elliot, *Teind Court Procedure*, 3, 11, 35, 101 *et seq.*). And where lands are feued out by a superior with the teinds for a cumulo feu-duty, a tenth of the feu-duty is to be taken as free teinds in the hands of the superior (see Elliot, p. 103). See TEINDS.

**Cumulative Jurisdiction.**—See JURISDICTION.

**Cumulative Legacy.**—See LEGACY.

**Curator.**—A person “employed to assist in the management of their affairs, *first*, those who are past pupillarity, but have not yet attained majority (fourteen years in males and twelve in females); and *next*, those who from infirmity of understanding, of whatever age, are incapable of acting like persons of entire capacity” (Fraser, *P. & C.* 144). It is proposed in this article to deal with the curators of a minor, under the heads of (1) the father as curator; (2) curators appointed by testament, or other writing (*a*) by the father, and (*b*) by strangers; (3) curators chosen by the minor; (4) pro-curators; and (5) curators *ad litem*. The guardianship of those of weak or unsound mind will be treated under the articles JUDICIAL FACTOR (*Curator Bonis to Incapax*) and TUTOR-AT-LAW (*q.v.*).

#### I. THE FATHER AS CURATOR.

A minor is not bound to have curators. Our law considers him, except in a few cases, as capable as one who has reached majority of managing his own affairs, though his deeds, if to his lesion, may be challenged (see MINOR). At the same time, from his youth and immature judgment, he is liable to deception and error, and he is, therefore, until he reaches majority, held a proper object for protection by the advice and assistance of a curator. The father, therefore, while they are unforisfamiliaried, is *ipso jure* administrator-in-law and curator to his legitimate minor children (Stair, i. 5. 12; i. 6. 35; Ersk. i. 6. 54, 55). His curatorial powers affect all property belonging to his child, whether coming from himself, or third parties, unless expressly excluded (Ersk. *supra*). His claim to the position bars the minor's choice of curators. He may, however, resign his rights, and consent to the minor choosing curators for himself (Ersk. *supra*; see Robertson, 1865, 3 M. 1077). Where the children are forisfamiliaried (see FORISFAMILIATION) or married, it would appear that the father's curatorial right no longer exists (Fraser, *P. & C.* 349–350). Neither the mother nor grandfather is entitled to act as administrator-in-law. (The mother's rights, under the Guardianship of Infants Act, 1886, only extend to pupil children (49 & 50 Vict. c. 86, s. 8)).

The father is so far privileged as curator that he is under no necessity to make up curatorial inventories, or take the oath *de fidei administratione*, or find caution unless *vergens ad inopiam* (see *Graham*, 1794, Mor. 16383; *Govan*, 1633, Mor. 16263). He is liable only for his intromissions—not for omissions or neglect in management (Ersk. i. 6. 55; Stair, i. 5. 12).

*Restriction of Father's Right.*—Although the father is alive, a curator *bonis* will be appointed by the Court to supersede him where his conduct shows gross violation of a parent's duty in regard to his child's estate, or where there is a conflict of interests (*McNab*, 1871, 10 M. 248; *Johnston*, 1822, 1 S. 558). Further, although mere poverty is not a sufficient ground for appointing a factor *loco tutoris* to supersede the father (*Wardrop*, 1869, 7 M. 532), yet where a father was bankrupt and in prison, and there was a likelihood of his spending the minor's estate, the Court allowed the latter to choose a curator (*Barclay*, 1698, 4 Bro. Supp. 405). Again, where in any judicial proceedings the interests of the minor and his father are opposed, a curator *ad litem* will be appointed to the former, to assist him in the proceedings (*McNeill*, 1796, Mor. 16384; see *Stirling*, 1851, 14 D. 206); and the same course will be followed where the father refuses his concurrence to any action brought by the minor (*McConochie*, 1847, 9 D. 791). See *CURATOR AD LITEM*, *infra*.

The father's rights as administrator suffer a limited restriction by third parties disposing property to the minor under express exclusion of the father, or under the charge of curators or trustees appointed by them (Ersk. i. 6. 54).

A minor daughter on marriage "passes from the guardianship of her father or other curators to that of her husband" (*Harvey*, 1860, 22 D. 1208); but the husband's death leads to the revival of the earlier curatory (*Fraser, P. & C.* 348). The husband does not make up inventories or find caution.

A bastard may choose curators for himself, though the father be alive or have appointed curators (*Wilson*, 10 Mar. 1819, F. C.); but the father may of course appoint trustees *quoad* any property left by him to the bastard (*Johnston*, 1785, Mor. 16374; *Fraser, P. & C.* 175).

For an account of the father's power to compel his child to work, and his right to the earnings as a recompense for aliment and education (Stair i. 5. 6 and 8), see *PARENT AND CHILD*.

*Father's Powers and Duties as Curator.*—These do not differ, except as before mentioned, from the powers and duties of ordinary curators, which are given in detail below (*POWERS AND DUTIES OF CURATOR*).

*WHO ARE ELIGIBLE TO THE OFFICE?*—The general rule is, that all persons are eligible who are *sui juris* and of sane mind. The qualifications are the same as those in regard to tutors (Ersk. i. 7. 12). It has been decided that outlaws (*Forbes*, 1673, Mor. 16287; Stair, i. 6. 30), aliens (*Miller*, 1792, Mor. 4651; see, however, *Dalhousie* and *Fergusson*, *infra*), and married women, while married (*Montrose*, 1695, 4 Bro. Supp. 277), may not be curators. On the other hand, an unmarried woman, or a widow, is eligible (*Johnston*, Balfour, 1550, Mor. 16222). It has been held to be no disqualification that the curator is resident abroad (*Dalhousie*, 1698, 4 Bro. Supp. 405); but in *Fergusson* (1870, 8 M. 426) the Court refused to sanction the nomination by a minor of a domiciled Englishman, on the ground that no necessity had been shown for choosing a person beyond the jurisdiction of the Court (cf. *Lord Macdonald*, 1864, 2 M. 1194). Where persons incapable of being curators are named by the father, the deed will be

read as not containing their names, and the other qualified curators will be entitled to the office (Ersk. i. 7. 3; *Baird*, 1711, Mor. 7431).

## II. TESTAMENTARY CURATORS.

(1) The Act 1696, c. 8, gave *fathers* the right, by any deed executed in *liege pousie* (see *Greig*, 1872, 11 M. 20), to nominate tutors and curators to their pupil and minor children respectively. Such a nomination is preferable to the election of curators by the minor under the earlier Act of 1555, c. 35, and the minor is compelled to accept the father's nominee (*Drumore*, 1744, Mor. 16349; see *Walker*, 1874, 2 R. 120; *Pitcairn*, 1731, Mor. 16339; Ersk. i. 7. 11; *More, Notes*, 40). It has been doubted how far this rule would hold where the father's right of administration has been excluded, and where the minor might have chosen curators during his life (*More, Notes, ib.*: see *Scott*, 1675, Mor. 8970). The father may revoke his nomination (Fraser, *P. & C.* 353).

The Act also allowed the father to limit the common-law responsibilities of curators *quoad* the estate coming from him, by empowering him to name them with the provision that they "shall not be liable for omissions, but for their actual intrusions with the means and estate descending from the father, and other deeds of administration thereanent; and that each of them shall only be liable for himself, and not *in solidum* for the others."

*Caution.*—Such curators do not need, in the ordinary case, to find caution (Fraser, *P. & C.* 353). But if the circumstances of the curators (whether appointed with limited liability or not) change for the worse, or if all the curators fail but one or two, or if there is maladministration, the Court has it in its discretion, upon the complaint of any near relation of the minor, to ordain the curators to find caution under the penalty of removal (Act 1696, c. 8; Ersk. i. 7. 3; Fraser, *P. & C. ib.*).

*Form of Appointment.*—Curators may be nominated by the father (*a*) simply, (*b*) jointly, (*c*) with a quorum, (*d*) with a *sine quo non*, or (*e*) conditionally. (*a*) Where the father appoints curators without imposing any conditions as to their mode of action, the nomination is *simple*. It only one should accept, or survive, his nomination subsists (Ersk. i. 7. 30; *Scott*, 1834, 7 W. & S. 236, Id. Brougham: *Fairside*, 1609, Mor. 14692; *Fisher*, 1758, Mor. 16361); and a substitution of another set of curators does not become effectual till all the first-named curators have failed. The majority are entitled to perform all acts of ordinary management (Fraser, *P. & C.* 210; Ersk. i. 7. 15; see *Scott*, 1759, Mor. 16361); but where there are only two, both must concur in acting (*Thornburn*, 1832, 10 S. 380); and it appears that a curator, accepting office, must act along with the others in all necessary administration (Fraser, *P. & C.* 211). (*b*) *Joint.*—Where the nomination is expressly joint, the general rule is that all must accept, and all must continue to act: failure of one, before or after acceptance, renders the nomination ineffectual as to the others (Ersk. i. 7. 30). But the appointment may be so framed as to modify the rule (*Scott*, 1775, Mor. 16371). All must concur in acts of administration, whether ordinary or extraordinary (Ersk. i. 7. 15). (*c*) *Quorum.*—The father may name a certain number to be a quorum, whose acts will be as valid as if the whole concurred. The dissent of the remainder is of no effect, but the whole quorum must consent to every act (Ersk. i. 7. 15 and 30; *Vere*, 1791, Mor. 16378). If the quorum fail, the entire nomination appears to be at an end if the minor chooses (Fraser, *P. & C.* 373). (*d*) *Sine quo non.*—The father may declare that no act of administration will be valid without the consent of a specified one,

or more, of the curators:—hence called the *sine quo non* or *sine quibus non*. If all fail except the *sine quo non*, the entire nomination is at an end (*Primrose*, 1715, Mor. 16335; *Blair*, 1735, Mor. 14702); and if the *sine quo non* declines to accept, or fails, and there is no specialty in the terms of the appointment, the entire nomination is void (see *Fraser, P. & C.* 211, 373, and authorities in note (a), p. 180; *Ld. Drumore*, 1742, Mor. 14703; *Bell, Prin.* s. 2074). But the general rule, as well as the powers of the *sine quo non*, may be modified in each case by the deed of nomination (*Dunmore*, 1742, Mor. 16347). He is appointed “to form a check” on the others. If he refuses to concur, the others cannot act (*Vere*, 1791, Mor. 16378). He must attend every meeting, and take part in every act of administration. After accepting office as *sine quo non*, the curator cannot resign as such, and act only as an ordinary curator (*Vere, supra*).

Any other reasonable condition may be imposed in the deed nominating the curators.

(2) *CURATORS OR TRUSTEES NOMINATED BY THIRD PARTIES*.—The Act 1696, c. 8, only empowered fathers to nominate curators. But a third party may gratuitously dispose property to a minor, at the same time nominating certain persons to manage that property, to the effect of excluding the management of ordinary curators. Such persons are, however, rather trustees than curators (*Fraser, P. & C.* 354; *Stair*, i. 6. 6; *Ersk.* i. 7. 13; *Scott*, 1675, Mor. 8970 and 16291; see *Johnston*, 1892, 20 R. 46); and their appointment does not prevent the father nominating, or the minor choosing, curators *quoad* the rest of the ward's property (*Stair, Ersk., Scott, supra*; see *Wilson*, 10 Mar. 1819, F. C.). The curators could, it is thought, call the trustees to account (*Fraser, P. & C., ut supra*; *Bell, Dict. h.t.*).

### III. CURATORS CHOSEN BY THE MINOR.

Where the curators nominated by the father have not accepted office, or, having accepted, have failed, the minor may either act without them or choose curators for himself; and should the latter fail, he may again make his choice. The minor's right of choice existed from an early date, and, finally, was regulated by the Act 1555, c. 35. The right, however, yields to the father's right of nominating testamentary curators, who are in all cases preferred (*Pitcairn*, 1731, Mor. 16339). The election is by judicial proceedings, either in the Court of Session, or the Sheriff Court of the minor's residence. For the nature of the process, citation of next of kin, etc., see CHOOSING CURATORS.

*ACCEPTANCE OF OFFICE*.—All curators nominated either by the father or minor, may decline office (*Ersk.* i. 7. 20). The Statutes of 1555 and 1696 do not prescribe any particular mode of acceptance. It may therefore be (a) *express*, by the curator signing a minute of acceptance, or, where appointed by deed, a declaration on the deed (*Ersk.* i. 7. 20; see *Sibbald*, 1626, Mor. 16246); or (b) *implied*, by the curator performing such acts of management as can be attributed to no other authority (*Stair* i. 6. 6), *e.g.* giving up inventories (*Watson*, 1714, Mor. 12767), signing deeds dealing with the ward's estate where he is designated curator (*Seton*, 1668, Mor. 2185; *Ersk. supra*; see also *Lockhart*, 1682, Mor. 16301; *Agnew*, 1687, Mor. 16310; *Mollison*, 1833, 12 S. 237). It was held in *Bruce* (1854, 17 D. 265) that testamentary curators who had signed a minute of acceptance by initials, and had lain by for eight years, had not accepted office under the Act of 1696.



*CAUTION*.—After acceptance and oath, the curators find caution (under the old law, and also the Statute 1555, c. 35). Though they are liable *singuli in solutum*, it was at one time usual for curators to be taken as cautioners for each other (see *McBriar*, 1711, 4 Bro. Supp. 828). In a later case, however, the Court declined to sanction the practice (*Grant*, 1848, 10 D. 1052). The application by the curator to have the bond of caution delivered up, should be by petition to the Inner House (*Murray*, 1874, 1 R. 45).

*MAKING UP CURATORIAL INVENTORIES*.—Curators of all kinds (except fathers, and the husbands of minor wives (*A. v. B.*, 1728, Mor. 8929)) who have accepted office, must, before entering on their duties, make up and subscribe inventories of the minor's whole estate, heritable and moveable. The matter is regulated by the Acts 1672, c. 2, and 1696, c. 8. The Statute of 1672 requires that the inventory be made with consent of the minor's next of kin on the father and the mother's side, major and within the kingdom for the time, and be subscribed by the curators and the next of kin. Three copies of the inventory, subscribed like the principal, must be judicially produced before the Judge Ordinary of the place where the minor's chief residence is, who ordains them to be recorded; and an act of curatorship is thereafter extracted, which forms the curators' title to administer. The copies are signed by the clerk of court and delivered, one to the curators, one to the paternal, and one to the maternal next of kin. Where the next of kin refuse to concur, or are absent, the curators are directed to cite them before the Judge Ordinary, who will ordain them to concur (*Jurid. Styles*, iii. 207–8; Lees, *Sheriff Court Styles*, 149). In default of their appearance or concurrence, the inventory is made up at the sight of the judge, or a delegate appointed by him; and three copies are prepared and signed as before, one being kept by the curator, and two remaining in the clerk's hands, sealed, to be delivered to the next of kin when they may apply for them (1672, c. 2). The usage is to cite two of the next of kin on both sides; and where necessary to dispense with their citation, the procedure for that end is the same as in the process of CHOOSING CURATORS (*q.v.*) (Fraser, *P. & C.* 198; Ersk. i. 7. 21). The summons of Choosing Curators, indeed, almost invariably contains a conclusion to have the next of kin ordained to concur in making up the inventory (*Jurid. Styles*, iii. 206; Lees, 147). The process may be brought in the Court of Session or the Sheriff Court: but where any of the next of kin reside in a county without the Sheriff's jurisdiction, letters of supplement must be used in order to cite them (Fraser, *P. & C.* 200), or, according to another authority (Dove-Wilson, *Sheriff Court Practice*, 497), the summons must be endorsed (1 & 2 Vict. c. 119, s. 24. Edictal citation is now competent in the Sheriff Court by 39 & 40 Vict. c. 70, s. 9).

Any property of the minor omitted from the inventory, and coming to the knowledge or possession of the curators, must be given up by them in an eik to the inventory (1672, c. 2). The inventory must be probative (*Watson*, 1715, Robertson's App. 134). It has been decided that curators nominated by third parties *quoad* specific estate bequeathed, must give up inventories (*Kilpatrick*, 1793, Mor. 16381); but this decision has been questioned (Fraser, *P. & C.* 175 and 203; Bell, *Dict. h.l.*).

The inventory forms the rule of accounting as between minor and curator, but payment to the curator who has not given up an inventory will be sustained (Ersk. i. 7. 23; *Harkness*, 1836, 14 S. 1015). Where the same persons are appointed both tutors and curators, and have made up inventories in the former capacity, it would appear to be unnecessary for them to do so of new as curators; but there is no express authority on

the point whether curators, who have not been the tutors, must make up new inventories when they accept office (Wallace, *Prin.* 363; Fraser, *P. & C.* 362).

*FAILURE TO MAKE UP INVENTORIES.*—The following penalties are incurred where the curators fail to give up inventories:—(1) Debtors of the minor are not bound to make payment to the curators (1672, c. 2); (2) the curators are liable for omissions, even where the father has expressly exempted them from this responsibility (1672, c. 2; see Ersk. i. 7. 22; *Henderson*, 1788, Mor. 16375; *Kilpatrick*, 1793, Mor. 16381; *Mollison*, 1833, 12 S. 237; *Murray*, 1833, 11 S. 663); (3) the curators forfeit any exemption from joint liability that their appointment may give them (*Kilpatrick*, *supra*; *Murray*, 1832, 10 S. 276); (4) they will not be allowed to deduct from the estate the expenses of law suits and legal diligences, or incidental personal expenses incurred in managing the minor's affairs (1672, c. 2; *Bruce*, 1709, Mor. 16327); but the expense of completing titles, and money expended on the entertainment of the minor, or on his estates, will be held a proper charge (*Yeaman*, 1707, Mor. 16323); (5) curators are removable by the Court of Session as suspect if they fail to make up the inventory (1672, c. 2; *Lothian*, 1724, Mor. 16337; *Austin*, 1826, 5 S. 177; *Gibson*, 21 Dec. 1811, F. C.). Some delay is of course allowed, and every case will be decided on its own circumstances (*Rob*, 22 Dec. 1814, F. C.; *Mittray*, 1686, Mor. 16310; *More*, *Notes*, xli.). It has been held that intromissions by a tutor, before giving up an inventory, do not render him personally liable for debts (*Wallace*, 1826, 5 S. 179).

The right to enforce the penalties is personal to the minor (*Harkness*, 1836, 14 S. 1015); while, on the other hand, from their nature, these do not transmit against the curator's heir, unless action has been taken against the curator, and litiscontestation has occurred in his lifetime (*Macturk*, 1830, 8 S. 995; *Mollison*, 1833, 12 S. 241; *Graham*, 1788, Mor. 5599–5600).

#### IV. CURATORS APPOINTED BY THE COURT.

In former times the Court were in the habit of appointing a curator who stood midway between the ordinary curator and a curator *ad litem*. The early reports show that it was the practice to appoint a curator to act along with a tutor, and control his administration where he was absent from the country, or incapacitated, or negligent (*McBrac*, 1667, Mor. 16278; *McBrair*, 1667, Mor. 16279; Ersk. i. 7. 26; *Bruce*, *Tutor's Guide*, 184). No such appointments have been made in modern times; and it is probable that in the like circumstances the tutor would be removed, and a factor *loco tutoris*, or a curator *bonis*, appointed (Fraser, *P. & C.* 361).

#### POWERS AND DUTIES OF CURATORS.

“In puberty, legal incapacity has come to an end, and though the law places minors *puberes* under guardianship, they can themselves legally act, in all cases with the advice and consent of their guardians, and in some cases without any aid and consent” (*Harvey*, 1860, 22 D. at p. 1208, per L. Pres. Inglis). The law, while admitting that a minor has capacity to act for himself (see MINOR), nevertheless allows him the benefit of a guardian for his protection in the management of his affairs. A tutor acts for the pupil; but the curator only advises and consents, while the minor is “the principal agent.” Where curators have been appointed, all deeds done, or contracts made, by the minor without their consent (with a few exceptions—see MINOR) are null by way of exception, although, if

beneficial for the minor, they may be held binding on the other party (Ersk. i. 7. 33). The powers of all curators—father, curators appointed by the father, or chosen by the minor—are alike; but they may be modified, as regards the two classes last mentioned, by the deed of nomination or appointment.

1. *PERSON AND EDUCATION*.—No guardians or Court have “any controlling power” over the person of a minor *pubes*, who may marry or alter his residence against the advice of his curators, and without their consent (*Harvey, supra*; *Graham*, 1780, Mor. 8934). And so, in regard to education and the selection of a profession, while it is the curator’s duty to offer advice and counsel, he has no power to *insist* upon his views being adopted (*Graham, supra*). He can only attempt to control the minor through his power over the expenditure, which must be with his consent; but he cannot make his consent conditional on his views being adopted (Fraser, *P. & C.* 365). The curator may not only employ the income of the minor for his aliment and education, but, if necessary, the capital may be encroached on in order to start the minor in a profession or business (Ersk. i. 7. 24; Bell, *Prin.* s. 2084).

2. *THE ESTATE*.—A curator cannot perform any act himself in regard to the minor’s estate; “the curator does nothing more than concur with him (minor), or consent to his deeds” (Ersk. i. 7. 14; cf. Ersk. i. 7. 16 and 33; Stair, i. 5. 12; i. 6. 35). (The consent may be given at any time (*Learmonth*, 1586, Mor. 16235), but apparently not after the minor’s death (Fraser, *P. & C.* 366)). Hence, as a rule, any act of the curator by himself is null, whether it be concerned with alienating, or leasing, or burdening the estate (*Pentland*, 1831, 5 W. & S. 28; *Murray*, 1744, 5 Bro. Supp. 737); or only with ordinary management and administration, such as discharging unimportant debts or uplifting rents (*Drummore*, 1744, Mor. 8930; *Bute*, 1725, Mor. 16338; *M’Intosh*, 1675, Mor. 11239; *Allan*, 1812, Hume, 586; Bell, *Prin.* 2096). He may, however, by himself recover the minor’s title deeds (*M’Kirdy*, 29 May 1840, F. C.). It is the curator’s duty to consult and advise with the minor as to all deeds to be granted by him, and to consent to such as are expedient; all deeds without such consent being, as a rule, null if the minor chose to reduce them. See MIXON.

*Entails*.—There are exceptions to the foregoing rule in the Entail Statutes. (a) *Consent*.—The Entail Act, 1853, by sec. 18, provides that, except in regard to disentail, every consent given on behalf of any heir of entail under age or legally incapable, whose consent is required under the Entail Amendment Act, 1848, by his curator authorised to consent under sec. 31 of the Act of 1848, shall be valid and sufficient without the concurrence of the heir, except that it shall not be acted on if the heir appear and oppose its reception. The Entail Act of 1882, s. 12, provides that in any application under the Entail Acts, where the consent is required of a person under age or subject to any other legal incapacity, the Court shall appoint his curator, or one of his curators, to be curator *ad litem*, and such curator may consent on the minor’s behalf without incurring any responsibility, unless it be proved that he acted corruptly. It is, however, the duty of a curator appointed to one of the nearest heirs in a disentail petition to communicate and advise with the minor as to giving consent (*Duff*, 1854, 16 D. 917). (b) *Applications*.—With regard to applications under the Entail Acts, sec. 12 (2) of the Entail Act, 1875, provides that applications to the Court, except for authority to disentail, sell, alienate, or charge with debt, may be made by the curator of a minor: and, finally, the Entail Act of 1882, s. 11, swept away all these exceptions but disentail,

enacting that in every case where an heir of full age might make an application to the Court under the Entail Acts, except an application for disentail, the heir in possession, if a minor, may, with consent of his curators, make such application, and carry into effect any authority given by the Court.

3. *GENERAL DUTIES OF CURATORS.*—It is within the power, and is the duty, of the curator to insist that his ward should act prudently in the management of his affairs. He is bound, indeed, to do so for his own safety, since he is liable for omission and negligence; and if the minor refuses to act along with him, his only course, as before stated, is to obtain his discharge (Ersk. i. 7. 29). Although a curator only concurs with the ward, and cannot act of himself, he is responsible for the proper course being followed and necessary acts performed (Fraser, *P. & C.* 371). If, however, the minor refuses to act along with the curators, the Court have no more power to compel him, than they have to authorise the curators to act without the minor, even though the consequence should be to elude the Act of 1696. That Act was never construed to the effect that the minor was bound to accept his father's nominees (*Murray's Curator*, 1744, 5 Bro. Supp. 737, and Mor. 8930 and 16349). The only course open to the curators, therefore, for their own protection, is to apply to the Court for their discharge (Ersk. i. 7. 29; Bell, *Prin.* s. 2096; *Scotstarvet*, 1642, Mor. 16266), which would be granted, the Court at the same time probably taking precautions for the minor's security, by causing him to nominate other curators (Act 1555, c. 35; *Brown, Petr.*, 4 June 1818, Fraser, *P. & C.* 370, note *c.*; *Scotstarvet*, *supra*). Similarly, it is thought that the Court would remove curators who refused to concur in a necessary act of administration (Fraser, *P. & C.* 312, 370).

*Management.*—The general duties of a curator in the *management* of a minor's affairs are similar to those of a tutor. Upon entering office, he ought to see that the minor's titles are made up, if this has not already been done, and his title deeds placed in safety (Ersk. i. 7. 24; Bell, *Diet. h.t.*). It is his duty to insist upon, and aid in, collecting outstanding debts, rents, and interest, and, if necessary, to advise and concur in raising actions, and using the requisite diligence for that end (Stair, i. 6. 36; Ersk. i. 7. 16). When money lent is insufficiently secured, he ought to see that it is timely called up (Stair, *supra*). The heritable estate ought, by his advice, to be kept in good repair, and proper tenants provided; and moveable subjects that are perishable, or likely to sink in value, ought to be sold (Ersk. i. 7. 24; see *Macconochie*, 1853, 2 Stuart, 567). All debts due by the minor ought to be paid, and other obligations discharged, within a reasonable time (Ersk. *supra*).

*Investments.*—The whole funds of the estate, capital and surplus income, ought, with the advice and assistance of the curator, to be safely and properly invested within a reasonable time after they have become available. The limits of investment are indicated by the Trusts (Scotland) Amendment Act, 1884 (47 & 48 Vict. c. 63), which will usually be followed by curators; though of course it will be kept in mind that a minor, with consent of his curator, has powers, generally speaking, as extensive as if he were of full age and capacity, and that these include a power to purchase land (*infra*). The Act provides (s. 2) that "trust" shall include *inter alia* the appointment of any curator, and that "trustee" shall include "curator," in the construction of the Trusts (Scotland) Acts, 1861 to 1884. By sec. 3 it is enacted that trustees (curators) may invest the trust funds:

(1.) in *purchasing* (1) any of the Government stocks, public funds, or

securities of the United Kingdom; (2) stock of the Bank of England; (3) any securities the interest of which is, or shall be, guaranteed by Parliament; (4) debenture stock of railway companies in Great Britain [not Ireland] incorporated by Act of Parliament; (5) preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment; (6) stocks or annuities issued by any municipal corporation in Great Britain [not Ireland], which annuities, or the interest or dividend upon which stock, are secured upon rates or taxes levied by such municipal corporation under the authority of any Act of Parliament; (7) East India Stock, stocks, or other public funds of the Government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such Government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer; (8) feu-duties or ground-annuals:

(II.) *in locum* on (1) the security of any of the stocks, funds, or other property which they have power to purchase; (2) real or heritable security in Great Britain [not Ireland]; (3) debentures or mortgages of railway companies in Great Britain [not Ireland] incorporated by Act of Parliament; (4) bonds, debentures, or mortgages secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain [not Ireland] authorised to borrow money on such security; (5) railway stock, debentures, bonds, or mortgages on which the interest is permanently guaranteed by the Indian Government and payable in sterling money in Great Britain.

Further, by sec. 44 of the Local Authorities Loans (Scotland) Act, 1891 (54 & 55 Vict. c. 34), trustees who have power to invest in "the mortgages, debentures, or debenture stock of any railway or other company," are authorised to invest in stock other than to bearer, issued under the Act.

Where stocks, etc., have to be approved by the Court of Session, it appears to be necessary to make application for approval each time an investment is proposed. It will not be enough that the special stock has been once approved, since circumstances may have changed (*Mackenzie's Tr.*, 1885, 12 R. 529; *Acc. of Court*, 1886, 14 R. 55).

The ordinary rules as to the *diligence* prestable by curators will apply, and they will be held responsible for negligence or bad advice in the matter of investments.

*Accounts.*—*The curator's accounts* ought to be annually balanced. All money received, capital and income, ought to be lodged in bank for safe-keeping. Formerly bank interest had to be allowed at three per cent., being current account rate, *de die in diem* on sums received, or which ought to have been received; but, looking to the decline in bank rates, it is unlikely that this rule would now apply, unless funds were unduly retained in the curator's hands (*Montgomerie*, 4 June 1822, F. C., and 1 S. 421). The curator ought to see that the balance of annual income, after meeting current expenditure, is safely and properly invested at a reasonable rate of interest within a reasonable time. If investments are easily obtainable, the period is three months, during which bank interest only is due; after that time the same interest will be charged as an ordinary investment would have produced (*Montgomerie, supra*; *Fraser, P. & C.* 236, 371; *Bell, Prin. s.* 2087). This is the rule as to tutors, and it is thought to be applicable to curators, at least where the funds are under the curator's control, and the minor is willing to follow his advice (*Fraser, P. & C.* 235).

But if the funds in the curator's hands are employed to profit in his own business, the full profits must be accounted for (*Cochrane*, 1855, 17 D. 321, and 1857, 19 D. 1019; also *Guthrie*, 1853, 16 D. 214; *Laird*, 1855, 17 D. 984; see as to this subject generally, Fraser, *P. & C.* 235; see also TRUSTEE). Stair says of curators (i. 6. 36), "seeing they must be accountable, they must not suffer the minor to have his own goods and money in his own hand, lest he lose or mis-spend them."

The provision of sec. 2 of the Trust Act of 1884, that "trustee" shall include "curator, etc.," makes available to curators, where necessary, all powers under secs. 2 and 3 of the Trusts (Scotland) Act, 1867; and the Judicial Factors (Scotland) Act, 1889, s. 19, applies to curators the provisions of the Trusts (Scotland) Act, 1867, Amendment Act, 1887, as to permanent and temporary *abatement*s of rent (see *Mollison*, 1890, 17 R. 303).

*SPECIAL POWERS GRANTED BY THE COURT.*—Since a minor, with consent of his curators, has, with certain exceptions, the same powers which a person of full age has over his property, the Court, though repeatedly applied to by curators, have declined to lessen their responsibility by authorising acts which the minor and his curators have full power to do without judicial authority. "No decree by the Court could prevent a reduction by the minor" (*Wallace*, 8 Mar. 1817, F. C.: Bell, *Prin.* s. 2096).

*A CURATOR CANNOT BE AUCTOR IN REM SUAM.*—A curator, like others in a similar fiduciary position, is debarred from entering into any transaction with his ward, or the estate under his charge, that is or may be profitable to himself at the ward's expense. Curators "cannot, contrary to the nature of their trust, interpose their authority to any deed of the minor, in which themselves have an interest, or which tends to produce an obligation against him in their own favour, more than they can be judges or witnesses, in their own cause" (Ersk. i. 7. 19; *Huntingdon Copper Co.*, 1877, 4 R. 294; 5 R. (H. L.) 1). "The rule simply means this, that the curator shall not . . . be a party to any deed whereby an obligation is constituted in his own favour against the minor" (Fraser, *P. & C.* 279; *Aberdeen Railway Co.*, 1854, 1 Macq. 461; *Perston*, 1863, 1 M. 245; *McGibbon*, 1852, 14 D. 605; *Ladyghairn*, 1632, Mor. 16260). Such a deed by a curator in his own favour, though with the minor's consent, is reducible (*McGibbon*, *supra*; *Mannell*, 1853, 15 D. 284), and has been said to be null (Fraser, *P. & C.* 280), though in the case of trustees it is only voidable, not void (*Buchner*, 1887, 14 R. 1006; *Fraser*, 1847, 9 D. 415). The rule applies where the deed is in favour of a near relation of the curator (*Sauquhar*, 1583, Mor. 16233).

On the same principle, it would appear that a curator, equally with a factor, cannot confer on himself, or any firm of which he is a partner, any office of profit connected with the estate (*Kennedy*, 1860, 22 D. 567; *Flowerbarrow*, 1854, 17 D. 263). Any consent of the minor is treated as being given without the concurrence of the curator, and is therefore useless. This rule applies to all transactions with the estate profitable to the curator, and the deeds objected to must have been granted during the subsistence of the curatory (*Thomson*, 1781, Mor. 8985; *McGibbon* and *Mannell*, *supra*).

The objection applies to *purchases* of the minor's estate by the curator, even at a public sale (Fraser, *P. & C.* 282; *Buchanan*, 29 Nov. 1809, and *Robertson*, 30 May 1806, Hume, *Sess. Papers*), though the Roman law (*Code*

iv. 38. 5) founded upon by Erskine (i. 7. 19) was to the contrary (see *York Buildings Co.*, 1795, 3 Pat. 378; *Thorburn*, 1853, 15 D. 845 (as to trustee); see also the opinion of L. P. Inglis in *Shiell*, 1874, 1 R. at p. 1089: that if, without fraud, a trustee buys the trust property at a public auction, the sale can only be set aside by a beneficiary under the trust).

A curator can neither *lend* money to the minor, unless it be a mere advance to carry on the management (Ersk., *supra*): nor borrow his funds even on heritable security (*Elphinstone*, 28 May 1814, F. C.: see *Preston*, 1863, 1 M. 245; *Croskery*, 1890, 17 R. 697).

If the curator employ the minor's funds in his own business, he must account for the full profits earned, the loss, if any, falling upon himself (*Cochrane*, 1855, 17 D. 321, and 1857, 19 D. 1019: see also *Laird*, 1855, 17 D. 984, and *Grant*, 1869, 8 M. 77).

The curator cannot *lease* any portion of the estate to himself (Bankt. i. 7. 57; Ersk. i. 7. 19; see *Gillespie*, 1821, 1 S. 160, and *Montgomery*, 1895, 22 R. 465, as to trustee), nor consent to renounce a lease held by the minor in order to acquire it for himself (*Wilson*, 1789, Mor. 16376; *Cochrane*, 1854, 17 D. 337, Ld. Cowan).

Where he acquires profitably, though with his own money, or gratuitously, rights or debts affecting the minor's estate, these accresce to the minor, because he is presumed to do for the minor's behoof what he ought to do (Ersk., *ut supra*; Stair, i. 6. 17; see *Wright*, 1842, 1 Bell's App. 574; *Cochrane*, 1732, Mor. 16339; *Touch*, 1661, Mor. 16278). The purchase is presumed to have been made with the minor's money; and in a subsequent accounting with the minor, the curator can claim no more than he paid (*Melville*, 1676, Mor. 16292).

Such deeds as we have been considering are reducible even against onerous assignees, creditors, or singular successors of tutors and curators, until these latter account to the minor (Stair, iii. 1. 22; *JDougall*, 1686, Mor. 16308; *Ramsay*, 1662, Mor. 11523; *Campbell*, 1667, Mor. 16279; *Dewar*, 1619, Mor. 16241; *Graham*, 1838, 1 D. 286, Lord Ordinary's note). The rule does not prevent a minor bequeathing his moveables to his curator (see MINOR): and it is said to be inapplicable to the curatory of a husband over his minor wife (Fraser, *H. & W.* i. 515: see AUCTOR IN REM SUAM).

*DILIGENCE PRESTABLE BY CURATORS.*—The rules on this subject are derived from the Roman law. Curators and tutors, on account of the ward's weakness and liability to deception, are liable in a higher degree of diligence than other parties acting gratuitously in a fiduciary position.

(1) Curators chosen by the minor are liable for *culpa levis in abstracto*,—that is, they must show such exact diligence as a prudent man would employ in his affairs, which may be, it is evident, more exact than the diligence they are wont to show in their own affairs (Ersk. i. 7. 26). (2) Testamentary curators, on the other hand, are liable only for *culpa levis in concreto*,—that is, they are bound merely to use such diligence as they can prove they generally employ in their own affairs (Ersk. *ib.*). (3) The law regards the case of the father with favour, owing to the nearness of the relationship, and holds him liable only for *culpa lata*, *i.e.* "gross and glaring negligence," amounting almost to dolo (Ersk. *ib.*).

*EXTENT OF LIABILITY.*—Curators, except the father, and those exempted by him (1696, c. 8), are at common law liable for omissions, as well as intrusions,—that is, for damage resulting from their failure to perform acts which, looking to the diligence prestable by them, they ought

to have performed, *e.g.* collecting timeously and prudently rents and debts, or using legal diligence for that purpose. This liability follows from the rules as to *diligence* indicated above.

Stated generally, the rule as to liability for *omissions* seems to be, that if curators take all usual precautions they will not be liable for loss through failure to do more than a prudent man would have done in his own affairs: but if they fail to take ordinary precautions such as should occur to any prudent man, the resulting loss will fall upon them personally (see *Stevenson's Trustees*, 1857, 19 D. 462; *Thomson*, 1852, 1 Macq. 236; *Kennedy*, 1884, 12 R. 275; *Knor*, 1888, 15 R. (H. L.) 83; *Racs*, 1889, 16 R. (H. L.) 33; *Carruthers*, 1890, 17 R. 780). Neither a clause of immunity, nor sec. 1 of the Trusts Act, 1861, will protect against a "positive breach of duty," or *malá fides* (*Knor, supra*, *Ld. Watson*); nor will such a clause operate to free from responsibility a trustee or curator who neglects to use the diligence required of him (*Knor, supra*).

The same rules apply to liability at common law for loss arising from *intromissions*. If the curator has acted prudently, in *boná fide* and with proper regard to the ward's interest, he will not be responsible for loss mainly on the ground that he, or some one else, might have acted more wisely in the circumstances (see *Murray*, 1833, 11 S. 663; *Moffat*, 1834, 12 S. 369; *Fraser, P. & C.* 301 *et seq.*).

The curators, with the exception of those whom the father has exempted under the Act of 1696, are also, at common law, liable *singuli in solidum*, even though they have not intermeddled with that estate (*Sinclair*, 1686, Mor. 14696; *Ersk. i.* 7. 27; *Stair, i.* 6. 36); and they have not the benefit of discussion or division (*Stair, i.* 6. 23; *Burnett*, 1675, Mor. 14696; see *Murray*, 1833, 11 S. 663). *Inter se*, however, they have the right to an action of relief (*Ross*, 1829, Jur. 369; *Burnett, supra*). A discharge granted by the minor to one of them would not discharge the others (*Scaton*, 1668, Mor. 3547). The benefit of any exemption from liability granted by the father to a testamentary curator is lost through failure to give up an inventory (*Murray*, 1832, 10 S. 276).

*Statutory Limitation of Liability.*—It would appear, however, though there has been no decision on the subject, that the common-law liability of tutors and curators for omissions, and for the acts of their co-tutors and co-curators, has by recent legislation been altered, and made identical with that of trustees. On these points the Trusts (Scotland) Act, 1861 (24 & 25 Vict. c. 84), by sec. 1, provides that all trusts constituted by deed or Act of Parliament, under which gratuitous trustees are nominated, shall, unless the contrary is expressed, be held to include *inter alia* a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions; and the Trusts (Scotland) Amendment Act, 1884 (47 & 48 Vict. c. 63), by sec. 2, enacts, as already stated, that in the construction of the Trusts (Scotland) Acts, 1861 to 1884, "trust" shall include the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise, and that "trustee" shall include tutor, curator, and judicial factor.

*TERMINATION OF THE OFFICE.*—The office terminates, and the curator's powers cease (1) on the minor attaining the age of twenty-one years: and where there are several minors, the rule holds in regard to each in turn (*Ersk. i.* 7. 29; *A. v. B.*, 1545, Mor. 16221; *Lockhart*, 1829, 3 W. & S. 481). (2) By the death, natural or civil, of the curator or the



ward (Ersk. *ib.*; Stair, i. 6. 24; *Forbes*, 1673, Mor. 16287; see *Graham*, 1590, Mor. 16236). The law is so laid down by Fraser (*P. & C.* 373); but in treating of tutory he doubts (p. 307)—there being no decision—whether, on the civil death of the pupil, his property would be removed from the guardianship of the tutor; and a similar doubt appears to exist as to the effect of the minor's civil death. The death of one of several curators who have been appointed *simply* and not *jointly*, will not terminate the curatory of the others (Ersk. i. 7. 31; Stair, i. 6. 36). Where the whole testamentary curators die, it is open to the minor to choose curators for himself). (3) By the marriage (*a*) of a female curator, as she herself is then under curatory (Ersk. *ib.*; *Kerbechill*, 1586, Mor. 9585; *Donaldson*, 1770, Mor. 16364; and authorities in Fraser, *P. & C.* 171 (note *k*)); and (*b*) by the marriage of a female minor, as the husband becomes the curator—the curator's right, however, reviving on the husband's death (Ersk. *ib.*, and i. 6. 54; *Sinclair*, 1564, Mor. 16229; *Harrey*, 1860, 22 Dunlop, 1208 (L. J. C. Inglis); Fraser, *II. & W.* i. 517; Fraser, *P. & C.* 348). (4) By the fulfilment of any condition under which the curatory is granted. If, for example, one out of several joint curators, or a *sine quo non*, or one of a quorum, chosen by a minor, die, the entire nomination is at an end (Ersk. i. 7. 30); but it has been decided that the minor, if he chooses, may retain the remaining curators without a new election (*Fairford*, 1666, Mor. 16277; Bankt. i. 7. 63). This decision has, however, been doubted, and the safer course is for the minor to elect of new. Where the *sine quo non*, etc., is one of a number of curators nominated in a testament, the whole nomination falls by his failure; but the minor may choose curators for himself (Fraser, *P. & C.* 373). (5) Curators may resign with permission of the Court, upon "reasonable causes" shown (1555, c. 35; Ersk. i. 7. 29); but the minor cannot grant such permission (Stair, i. 6. 36). As before stated, the curators will be freed where the minor unreasonably refuses to act along with them. (6) Curators, including the father, may be removed by the Court of Session as suspect, in the same way and on the same grounds as tutors (Ersk. *ib.*; see *Malcolm*, 1840, 16 Fac. 65). This liability is incurred whenever a curator, through negligence, or incapacity, or dolo, has failed to perform the duties of his office (Ersk. *ib.*). The same result follows intellectual or physical incapacity (Stair, i. 6. 24; Ersk. *ib.*; see *Munnoch*, 1837, 15 S. 1267). The following may be noted as instances illustrative of the general rule: Failure to give up inventories (see *supra*); failure to institute necessary actions, or to state a valid defence (*Mersington*, 1684, 4 Bro. Supp. 272; Stair, i. 6. 26); embezzlement of the funds, or failure on the part of a father or testamentary curators to find caution when ordained to do so (1696, c. 8; *Welsh*, 1778, Mor. 16373; *Witherspoon*, 1775, Mor. 16372; Bankt. i. 7. 34); negligently allowing the estate to decay (*Herriot*, 1564, Mor. 16229), or the curator placing the funds in danger by employing them in his own business (*Dewar*, 1853, 16 D. 163 and 489). But it is said to be no ground for removal, that the curator is negligent in managing his own affairs (see Fraser, *P. & C.* 314).

Proceedings for removal may be instituted at the instance of the minor (who would have a curator *ad litem* appointed), or of a co-curator, or "of any near relation to the minor" (1696, c. 8), or of the cautioners. Some doubt formerly existed as to the form the proceedings should take, the removal in some cases being effected by formal summons (*Jurid. Styls.* 2nd ed., iii. 113; Bell, *Prin.* s. 2086; *Hamilton*, 1700, Mor. 14965; *Austin*, 1826, 5 S. 177), and in others by summary petition under the Act of 1696, c. 8 (*McLaurin*, 1831, 3 Jur. 550; *Butchart*, 1851, 13 D. 1258; and see

*Dewar*, 1853, 16 D. 163). Although a summons is still competent (the form does not appear in the 3rd ed. of the *Jurid. Styles*), the modern procedure, following the analogy of the removal of trustees (*Mitchell*, 1864, 2 M. 1378; see TRUST), and of officers acting under the Pupils Protection Act, 1849 (see JUDICIAL FACTOR), would be by summary petition presented to one of the Divisions of the Court. This view derives weight from the fact, before stated, that in the construction of the Trust Acts "trustee" now includes curator (Trust (Scotland) Amendment Act, 1884, s. 2). When the curators are removed, the minor can choose others for himself; or the Court, if desired by the minor, would probably appoint a *curator bonis*. The curators' powers cease upon removal, and all subsequent acts by them are null.

*ACCOUNTING*.—When the curatory terminates, an accounting takes place between the minor and his curators (Ersk. i. 7. 31). Where the minor has discharged his curator extra-judicially, the curator may present a petition to the Court for delivery of the bond of caution (*Rintoul*, 1861, 23 D. 357; *Young*, 1864, 2 M. 695). If parties, however, are unable to arrange their accounts, and the curator to obtain his discharge, extra-judicially, an action of count and reckoning may be raised either by the minor—called the *actio curatelle directa*; or by the curator—called the *actio curatelle contraria* (*Stark*, 1843, 5 D. 542). In the latter action, the curators may procure their discharge. Except that the parties are reversed, the actions and their course are identical, and are competent in the Court of Session and Sheriff Court. They may be raised by or against the heirs of the parties. The cautioners and all the curators should be called as parties by the minor (*A. v. B.*, 1538, Mor. 16219; *Napier*, 1684, Mor. 2186; *Stair*, i. 6. 23).

*Charge*.—In the accounting, the *charge* side should give the minor credit for the property in the curatorial inventory, and all other sums which the curator has received, or, with diligence, ought to have received; and the curator must show how these have been treated. The inventory, however, is not conclusive against either party (Ersk. i. 7. 31; *Bell*, *Prin.* s. 2087; *Cleland*, 1679, Mor. 12451; see *Butchart*, 1863, 1 M. 1123). The curator also charges himself (with a few unimportant exceptions (see *Fraser, P. & C.* 322)) with the income of the estate—all rents, the interest which the funds have, or should have, produced (*Montgomery*, 1822, 1 S. 421; 4 *Dow*, 110), and all other profits derived from their use (*Laird*, 1855, 17 D. 984; *Cochrane*, 1855, 17 D. 321, and 19 D. 1019). All "eases" received in settling transactions, and all "gratuitous acquisitions" to the minor's estate likewise fall to the minor (*Cochran*, 1732, Mor. 16339; *Bell*, *Prin. ib.*). The rules in regard to the investment of the funds and the interest allowed thereon have been already stated (see *antea*, *ACCOUNTS*).

*Discharge*.—The *discharge* side of the account will bear all proper disbursements duly vouched, interest on all advances made by the curators for the minor (Ersk. i. 7. 32; *Condie*, 1834, 13 S. 61), and personal expenses incurred in the management (*Tailfer*, 1677, Mor. 16293). The curator is also entitled to be kept free of all losses sustained by him in the course of his management, to be relieved from all reasonable engagements made for the minor, and to be reimbursed, with interest, all proper payments made with his own funds (Ersk. *ib.*; see *Stewart*, 1828, 6 S. 591). He is allowed the expense of all reasonable litigation, though unsuccessful (*Fraser, P. & C.* 324, and note *f*). The office being, like tutory, gratuitous, no claim lies for services rendered (Ersk. i. 7. 15; *Kennedy*, 1860, 22 D. 567); and though the curators may appoint a salaried factor, they

cannot, without special power, choose one of their own number, to the effect of entitling him to more than his actual outlay (*Fegan*, 1855, 17 D. 1146). The accounting is usually cleared up by a remit to an accountant (see *Stark*, 1843, 5 D. 542.)

*Presumption of intus habet*.—Till the accounting is complete, the presumption of *intus habet* applies,—in other words, that the curator holds property of the minor sufficient to meet any claim he has against the minor (Ersk. i. 7. 32; *McClure*, 1676, Mor. 16292). But this presumption does not apply to debts due to the curator by the ward's father before the guardianship began (*Muir*, 1690, 4 Bro. Supp. 298). It applies although the decennial prescription has run in favour of the curator (*Baillie*, 1714, Mor. 10001). Another result of the presumption is, that all purchases of rights affecting the minor's estate, made while the curatory endures, are presumed, even against the curator's onerous assignee or singular successor, to be made with the minor's funds (*Ramsay*, 1662, Mor. 9977; *McDougall*, 1686, Mor. 16308).

The liabilities of the curator begin at the date of his acceptance (*Bontine*, 1838, 1 D. 286), even though he has not at any time intromitted with the funds (Ersk. i. 7. 20). The minor may of course, on majority, discharge the curator extra-judicially, without any accounting; and, even by will, free him from the liability to account and from any failure in diligence (*Stair*, i. 6. 34).

*DECENNIAL PRESCRIPTION OF ACCOUNTS*.—In early times, the obligation to account was subject to the long prescription. This caused abuses, which led to the provision of the Act 1696, c. 9, that all actions of count and reckoning competent to minors, not insisted in within ten years after majority, or after their death, if dying in minority, should prescribe, and the curators be fully liberated. It is enough to call the summons in court (Ersk. iii. 7. 25), as this interrupts the prescription for forty years (Ersk. iii. 7. 43; Act 1696, c. 9). The curator does not lose the benefit of the prescription by failing to give up curatorial inventories (*Mercer*, 1736, Mor. 10996; *Gowans*, 1831, 10 S. 144), but the presumption of *intus habet* (*supra*) holds after prescription. The curator's action against the minor also prescribes in the same time (1696, c. 9). The Act declares that the presumption is not to run against minors, *i.e.* the heir of the ward or the curator. Where there are several minors, the ten years run from the termination of the curatory of each respectively (*Fraser, P. & C.* 328).

*POWERS OF MINORS WITH CONSENT OF CURATORS*.—When a minor has a curator "to guide his inexperience and supply the immaturity of his judgment," he has, with the curator's consent, the same power over his property (with a few exceptions) as a person of full age. His power to do the following ordinary acts, with the curator's consent, has been settled by decision: to sell the estate, heritable and moveable (*Hamilton*, 1630, Mor. 8981; *Wallace*, 8 Mar. 1817, F. C.; Ersk. i. 7. 33); to grant leases for the same periods as ordinary proprietors (*Alexander*, 1803, Hume, 411; Rankine on *Leases*, 21, and authorities there noted); to borrow money (*Harkness*, 1836, 14 S. 1015); to submit and refer (*Williamson*, 1739, Mor. 8965); to renounce as heir (*Bannatyne*, 1664, 2 Bro. Supp. 362); to appoint factors (see *Fegan*, 1855, 17 D. 1146).

It is the case, however, on the other hand, that even with consent of his curator, no minor can alter the succession to his heritable estate by any gratuitous deed: and so while a minor's testament, even without the curator's concurrence, is as effectual as that of a major (Ersk. i. 7. 33;

Bell, *Prin.* s. 2089; *Yorkston*, 1697, Mor. 8950), a disposition of land *mortis causa*, even with consent, is null (*Clydesdale*, 1726, Mor. 8964; *Cunningham*, 1796, Mor. 8966, Bell, *Prin. ib.*; *Irvine*, 1808, Mor. App. Deathbed, 6). It appears that this rule is inapplicable to subjects heritable only by destination (see *Brand's Trustees*, 1874, 2 R. 258). It has been found, also, that even with consent a minor cannot make donations, or gratuitously discharge debts (*Saltcoats*, 1623, Mor. 8958; *McCulloch*, 1731, Mor. 8965). While acts by a minor without consent of his curator are, with a few exceptions, null (Bell, *Prin.* s. 2089), and subject to challenge at any time, it must be kept in view that acts in which the curator concurs may be reduced by a minor within four years after majority—the *quadrimum utile*—on proof of lesion (see MINOR). For the effect of deeds by a minor who has no curators, or in which they have not concurred, and for the powers of a minor generally, reference is made to the article on MINOR.

**ACTIONS BY AND AGAINST A MINOR.**—(1) A curator is debarred from suing as such without the minor's consent, or carrying on an action which his ward disclaims (*Allan*, 1812, Hume, 586: cf. *McKirdy*, 29 May 1840, F. C., which was wholly special; Mackay, *Pract.* i. 314). It appears, however, that a minor who has curators may sue alone (Mackay, *ut supra*), but it is proper that his guardian should concur, or that a curator *ad litem* be appointed (*Cunningham*, 1880, 7 R. 424). It is competent to sist the curator later, when the action is in court (*Robertson*, 1829, 7 S. 421). When there is no curator (*Christie*, 1873, 1 R. 237), or where he declines to concur or to be sisted (*McConochie*, 1847, 9 D. 791), or is incapable (*Rankine*, 1821, 1 S. 117), or where his interest is opposed (*Sanders*, 1821, 1 S. 113),—the Court will appoint a curator *ad litem* (Mackay, *ut supra*).

If the minor sues without his curator, and no curator *ad litem* is appointed, the decree against him might be set aside, as in absence (Ersk. i. 7. 33), or a reduction brought on the ground of minority and lesion; and the latter course is competent even where the guardian concurs, or where the minor has no guardian (Ersk. i. 7. 35, 38). In a special case presented for several children, with the father as administrator-in-law in each case, the Court held that, though the father had no adverse interest, he could not represent rival interests; and as, being abroad, he was unable to elect whom to represent, they appointed separate curators *ad litem* for the parties (*Ross*, 1877, 5 R. 182; cf. *Park*, 1876, 3 R. 850).

(2) Where the action is *against* the minor, the father or curator, or husband if the minor is married (*French*, 1622, Mor. 2179), should also be made a defender and cited personally (*McTurk*, 7 Feb. 1815, F. C.), although edictal citation has been held enough (*Buchanan*, 1801, Mor. Adjudication, App. 12). Where the citation is personal, edictal is unnecessary (*Lie*, 1630, Mor. 2182; *Erskine*, 1852, 14 D. 766). Where there is no curator, the "tutors and curators, if he any has," ought nevertheless to be cited edictally (Mackay, *Pract.* i. 346). Where curators have not been cited in any form, it is thought that a decree against the minor would be a decree in absence (Mackay, *ib.*; *Anderson*, 1828, 6 S. 1145; see also *Cunningham*, 1880, 7 R. 424).

Curators, if not made defenders originally, may be called by a supplementary summons (*Thomson*, 1863, 2 M. 114); and if they are not called (*Cunningham*, *supra*), or decline (*McConochie*, 1847, 9 D. 791), or are incapacitated, or have an adverse interest (*Studd*, 1883, 10 R. (H. L.) 53),—a curator *ad litem* may be appointed by the Court, as in the case where the minor is pursuer (Mackay, *supra*; see *Curator ad litem*, *infra*).

(3) *Decree, Diligence, and Expenses.*—The minor—not the curator—is

liable to diligence on the decree (*Thomson*, 1747, Mor. 8910), arrestments are lodged in his hands (*Gibson*, 1748, Mor. 2777), and a judicial reference is made to his oath (*Forbes*, 1628, Mor. 8920; *Dickson on Evidence*). It would appear that a curator who acts along with the minor, and personally takes a prominent and leading part in the litigation, is liable in expenses if unsuccessful (*Fraser*, 1892, 19 R. 564; *White*, 1894, 21 R. 649), although "if he consents merely to make an action formally competent, there may be just grounds for not subjecting him to liability for expenses" (per *Ld. Young*, 19 R. p. 566).

#### PRO-CURATOR.

A person "who acts as curator without having a legal title to the office" (Ersk. i. 7. 28). The acting must be *as curator*: and whether the office has been assumed is always a question of circumstances. In *Fowler* (1739, Mor. 16343), a widow who applied to have property belonging to her children inventoried and valued, disposed of goods in hand, uplifted and paid debts, was held liable in the obligations of a pro-tutor. On the other hand, persons to whom the executor of a deceased, with consent of the widow, disposed the estate in trust for the widow and children, and who intromitted therewith, were held not to be in the position of pro-tutors or pro-curators (*Fultons*, 1864, 2 M. 893). And again, in *Dunbar* (1887, 15 R. 210), where law agents, who had previously managed an estate, continued to assist the brother of the deceased proprietor, who assumed the management without authority, they were held not to be pro-curators. Generally, where parties act as curators, believing themselves to be curators but having no title, or knowing that they have no title, or where they labour under some legal disability: or where curators act without finding caution or making up an inventory,—they are held subject to the liabilities of pro-curators (Ersk. *supra*; *Fraser*, *P. & C.* 451; *Cass*, 1671, Mor. 3504).

*Powers*.—Pro-curators have no recognised powers (*Bell, Prin.* s. 2102), and do not enjoy any of the "active powers" of curators (Ersk. *supra*). They cannot sell any part of the minor's property, such a sale being null even in a question with a *bonâ fide* onerous purchaser (*Dig.* xxvii. 5. 2; *Fraser, P. & C.* 452); nor can they sue the minor's debtors (Ersk. *supra*). They have no authority to receive sums due to the minor, and consequently a debtor paying to them is not released unless the payment is applied to the ward's benefit (*Allan*, 1715, Mor. 5654; see *Lockhart*, 1829, 3 W. & S. 481).

*Liabilities*.—Pro-curators are liable for omissions from the date of their "actual intermeddling," as well as for intromissions, and must show the same diligence that an ordinary curator is bound to use (Ersk. *supra*; A. S. 24 June 1665; *Fowler, Cass, Fultons, supra*). They cannot be *actores in rem suam*, and all eases given them by creditors of the ward must be allowed to the latter (*Tolpuhoun*, 1683, Mor. 16305). If the intermeddling began shortly after the father's death, the pro-curators must account for the whole estate left by the father (*Muir*, 1697, Mor. 16316).

*Accounting*.—Although ordinary curators are not bound to account till their office terminates (Ersk. i. 7. 31), pro-curators have not this privilege, and may be called upon to account and resign at any time. They are entitled to credit, or to sue, for all sums disbursed profitably for the minor during their administration (Ersk. i. 7. 28; see *Paterson*, 1862, 24 D. 1570).

[Ersk. i. 7; Ersk. *Prin.* i. 7; *Stair*, i. 6; *Bell, Prin.* s. 2088; *Bell, Comm.* i. p. 129; *Fraser, P. & C.*]

See MINOR: PARENT AND CHILD; TUTOR: JUDICIAL FACTOR.

## CURATOR AD LITEM.

A person appointed by the Court to assist in judicial proceedings any party thereto who has no legal capacity, or whose capacity is incomplete. The guardian of a pupil or minor, the husband for a wife, and the curator *bonis* or tutor of an *incapax*, ought as a rule to sue or concur, or be cited as a defender, in actions by or against the parties for or with whom they act.

*PUPIL*.—(a) *Pursuer*. Where a pupil suing has no legal guardian (*Christie*, 1873, 1 R. 237; *Sinclair*, 1828, 6 S. 336; *Calderhead*, 1832, 10 S. 582; *Keith*, 1836, 15 S. 118, Lord Corehouse), or where the action is by the pupil against the guardian (*MacNeil*, 1798, Mor. 16384), or where the guardian has an adverse interest (*Bogie*, 1840, 3 D. 309; see *Ross*, 1877, 5 R. 182), or refuses to sue (*McConochie*, 1847, 9 D. 791), or is incapacitated by insanity or otherwise (*Rankine*, 1821, 1 S. 118),—the Court will appoint a curator *ad litem*. When the pupil, previously represented by tutors, attains puberty, he should be sisted and a curator *ad litem* appointed (*Mackenzie's Trustees*, 1846, 8 D. 964). Where the action is not at the instance of, or concurred in by, the guardian or curator *ad litem*, all decrees will be null (*Mackay, Pract. i.* 312). (b) *Defender*. In actions against a pupil, the guardians should also be called as defenders; and where there are none, the tutors and curators should be cited edictally (*Calderhead, supra*). If tutors are not called, all decrees in the action are null (see *Mackay, Pract. i.* 344); if tutors are called and do not appear, and no curator *ad litem* is appointed, any decree against the pupil will be held as in absence (*Sinclair*, 1828, 6 S. 336; *Bannatyne*, 14 Dec. 1814, F. C.: *Brown*, 1835, 2 S. & M. 103; *Mackenzie*, 1861, 23 D. 1201 (Lord Ordinary's note)). The guardians may, however, be called in a supplementary summons (*Thomson's Trs.*, 1863, 2 M. 114). Where there are no guardians, or they decline to appear, or are incapacitated or have an adverse interest, the Court will appoint a curator *ad litem*. In *Morrison* (1894, 21 R. 889, 1071) a curator *ad litem* was appointed in a petition for custody (see *Fisher*, 1894, 21 R. 1076). See PUPIL.

*Minor*.—(a) *Pursuer*. A minor has a person in law, and can sue alone (*Mackay, Pract. i.* 314, note); but his guardian ought to concur (*McTurk*, 7 Feb. 1815, F. C.), or a curator *ad litem* should be appointed, otherwise decree against the minor might be set aside, as in absence (Ersk. i. 7. 33), or reduced on proof of lesion (see MINOR). Curators may be sisted as concurring pursuers when the action is in court (*Robertson*, 1829, 7 S. 421). (b) *Defender*. Where the minor is *defender*, and there is no citation of his curators, personally or edictally, or where they are cited and do not enter appearance, it would seem that decree against the minor would be held in absence (*Anderson*, 1828, 6 S. 1145; *Mackay, Pract. i.* 346); and it has been stated (per Ld. Pres. Inglis in *Cunningham*, 1880, 7 R. 424) that if the minor can show that he suffered lesion from want of a curator, the proceedings may be set aside.

Whether pursuer or defender, if the minor has no legal guardians (*Christie*, 1873, 1 R. 237), or they decline to appear (see *McConochie*, 1847, 9 D. 791), or are incapacitated (*Rankine*, 1821, 1 S. 118), or have an adverse interest (*Scunders*, 1821, 1 S. 115; see *Stirling*, 1851, 14 D. 206), or where the father has to represent rival interests (*Ross*, 1877, 5 R. 182),—the Court will appoint a curator *ad litem* (*Mackay, Pract. i.* 314, 346; *Cunningham*, 1880, 7 R. 424).

Where no appearance is made for a pupil or minor, the pursuer cannot

move that a curator *ad litem* be appointed, and he must therefore be content with taking a decree in absence (*Sinclair*, 1828, 6 S. 339). See CURATOR, *Actions by and against a Minor*.

*Wife.*—(a) *Pursuer*. The rule is that the husband's consent, as administrator-in-law, and for his own interest, is necessary to all actions brought by the wife (Ersk. i. 6. 21; Fraser, *H. & W.* i. 566); and a decree in an action raised by the wife without his consent would not be binding on her (Mackay, *Pract.* i. 307). Any defect, however, in the instance would be cured by the husband sisting himself as a pursuer (*Lytle*, 1849, 11 D. 404; see *Slowey*, 1865, 4 M. 1). Where the husband is incapacitated (*Bold*, 1729, Mor. 6002), or has an adverse interest (*Smith*, 1866, 4 M. 279), or refuses without reasonable cause to concur (*Cullen*, 1830, 9 S. 31; *Blair*, 1829, 8 S. 264),—the wife may sue alone, and a curator *ad litem* will be appointed to her as the first step in the process (Mackay, *Pract.* i. 311). There are, however, exceptions to the general rule, and in the following cases the wife may sue alone, without the concurrence even of a curator *ad litem*: (1) where the wife is judicially separated, or where an order of protection has been made and intimated (24 & 25 Vict. c. 86, ss. 5 and 6); (2) in consistorial actions, and in petitions under the Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86). (b) *Defender*. In actions against a wife, the husband must be called "for his interest," even when the ground of action is her delict (Ersk. i. 6. 21; *Clark*, 1829, 1 Sc. Jur. 392; *Spence*, 1739, Mor. 6080). If he is not called, the decree against her is held to be in absence (Mackay, *Pract.* i. 342). Where the husband refuses to appear, and the wife has an interest to defend, she may do so, and a curator *ad litem* will be appointed (*Cullen*, 1830, 9 S. 31). The husband need not, however, be called where the wife carries on a separate business, and a curator *ad litem* will be appointed to her if asked (*Gifford*, 1853, 15 D. 451; *Gray*, 1840, 2 D. 1205; *Chirnside*, 1789, Mor. 6082; see *Alcock*, 1845, 7 D. 819; *Orme*, 1833, 12 S. 149; Mackay, *Pract.* i. 345). Where judicially separated, or holding an order of protection (24 & 25 Vict. c. 86, ss. 5 and 6), the wife may be sued as if unmarried.

*Insane Persons* (a) cannot sue (*Reid*, 1839, 1 D. 400). Actions are at the instance of tutors-at-law, or tutors dative, or curators *bonis* (*Wallace*, 1830, 9 S. 40; *Mackenzie*, 1845, 7 D. 283). Where a pursuer became insane during the course of an action, time was allowed to apply for a curator *bonis*; and no application being made, the Court, on the motion of the defender, appointed a curator *ad litem* (*Mitchell*, 1864, 3 M. 229; *Anderson*, 1871, 18 S. L. R. 325; see *Walker*, 1867, 5 M. 358). (b) Actions against a person insane, but not cognosced, should be directed against him and his curator *bonis*, if he has one (*Govan*, 20 Dec. 1814, F. C.). Where he is cognosced, the guardian alone may be sued (Fraser, *P. & C.* 549). If an action is brought against a person of unsound mind, the Court will sist procedure to admit of a curator *bonis* being appointed (see *Lindson*, 1843, 5 D. 1194). But a curator *ad litem* is sometimes appointed in special circumstances (*Mitchell*, 1864, 3 M. 229; see *Walker*, 1867, 5 M. 358, and *Engel*, March 1877, Mackay, *Pract.* i. 315, note (d)).

*Entail*.—In entail petitions where any heirs of entail, whose consent is required, are under age or subject to any legal incapacity, the Court is authorised to appoint a separate curator *ad litem* to each such heir (Entail Amend. Act, 1848 (11 & 12 Vict. c. 36, s. 31); *Hamilton*, 1853, 15 D. 371). Where intimation, but not consent, is required, it is usual in practice to appoint only one curator *ad litem* to the three nearest heirs of entail. The curators are appointed after intimation and service has been

made (*Inglis*, 1855, 17 D. 1005; see also *Kerr*, 1857, 14 D. 240; *Burton*, 1851, 13 D. 955). A claim against a curator *ad litem* for loss alleged to be due to the curator's failure to take adequate security for a sum awarded for consent to a disentail, was held irrelevant, there being no averment that he had acted corruptly (*Maxwell Heron*, 1893, 21 R. 230). (For the powers of such curators to make applications and give consent under the Entail Acts, see 16 & 17 Vict. c. 94, s. 18; 38 & 39 Vict. c. 61, s. 12; 44 & 45 Vict. c. 53, ss. 11 and 12, and *antea*, *Powers of Curators*.)

*Who are Eligible?*—Any competent person may be appointed curator *ad litem*, but it has been judicially stated to be undesirable to appoint the agent of the party (Lord Rutherford in an unreported case; see *Mackay*, *Pract.* i. 316).

Either party to an action may move for the appointment, and where there is no motion the judge ought to make the appointment *ex proprio motu* (*Culderhead*, 1832, 10 S. 582; *Bell*, *Dict. h.t.*). No appointment is made, as a rule, until appearance has been entered for the pupil or minor (*Sinclair*, 1828, 6 S. 336; *Culderhead*, *ut supra*; *Fraser*, *P. & C.* 156). The curator, on being appointed, appears at the bar and takes the oath *de fidei administratione*, upon which an interlouctor is signed, which completes his title. His powers are confined to the particular action in and for which he is appointed, and it is unnecessary for him to find caution (*Young*, 1828, 7 S. 220; *Bell*, *Dict. h.t.*).

*Powers and Duties.*—It is the duty of the curator *ad litem* to advise his ward, where a minor or married woman: and to act for him, where a pupil or insane (*Mackay*, *Pract.* i. 316). He must do his best for the ward's interest (see *Maxwell Heron*, 1893, 21 R. 230), exercising an independent judgment, since, it appears, the Court will not advise him (*Hepburn*, 1866; 4 M. 1089). As the ward, when capable, is the *dominus litis*, the curator cannot continue an action against his wish (*Graham*, 1843, 5 D. 497). It has been decided in the First Division of the Court that a curator *ad litem* who obtains decree for a sum in favour of his ward, cannot discharge it, and that a special formal application must be made to the Court for the appointment of a curator *bonis* (*Pratt*, 1855, 17 D. 1006; *Anderson*, 1884, 11 R. 870). The practice appears to be different in the Second Division, where, in the original action, a party has frequently been appointed to administer a fund recovered for minor children (*Collins*, 1882, 9 R. 500; *Macoy*, 1882, 19 S. L. R. 441; *Sharp*, 1885, 12 R. 574). See *Jack* (1886, 14 R. 263), where the mother, as guardian under the Act of 1886, was held entitled to grant a discharge on behalf of pupil children; and the minor children were held entitled to grant a discharge, without a curator being appointed, the sums paid being of the nature of alimentary payments (First Division).

The curator cannot compromise an action against the wish of his ward (*Stephenson*, 1844, 6 D. 377): and it is doubtful if he can do so at all where the ward is incapable (*Mackay*, *Pract.* i. 316).

A curator *ad litem* is entitled to ordinary professional remuneration, and to any expenses he may reasonably incur, even where, after consideration, he elects not to appear (*Robertson*, 1849, 11 D. 1201; *Collic*, 1851, 13 D. 841). The curator appointed to a minor, called as respondent in a petition for disentail, was found entitled to recover from the petitioner the expenses of his appointment, and any other expenses properly incurred (*Johnstone*, 1885, 12 R. 468); while in *Studd* (1883, 10 R. (H. L.) 53), a father suing his pupil child was held bound to provide reasonable means to enable a curator *bonis* to attend to the child's interests. The



opposite party is only liable for the expenses of the curator *ad litem* where there is a separate appearance for the ward (*Macfarlane*, 1847, 9 D. 793).

There is no personal liability on the curator *ad litem* for expenses of process (*Fraser*, 1847, 9 D. 903).

### **Curator bonis.**—See JUDICIAL FACTOR.

**Current Deposit Account**—or **Cash Account**, as it is sometimes erroneously called—is the name given to that ordinary operative account which a person has with his banker. Whether the account be debtor or creditor, secured or unsecured, the legal principles applicable to transactions on it are the same. All sums paid into the account form one blended fund, the parts of which have no longer any distinct existence. With regard to drawings on the account, the first item on the credit side, whether the customer or the banker be the lender, is presumed to discharge or reduce *pro tanto* the first item on the debit side, and the sum first paid in is presumed to be the first drawn out (*Devaynes, Clayton's case*, 1 Meriv. 308; *Ross*, L. C. M. L. iii. 654; *Kinnaird*, L. R. 10 Ch. D. 139; *London & County Bank*, L. R. 6 App. Ca. 722). It has been decided by the Court of Appeal that the rule in *Clayton's case* does not apply to fraudulent entries (*Lacey*, L. R. 4 Ch. D. 537).

**Trust Money.**—Where a person pays money intrusted to him in a fiduciary capacity into his own bank account and immixes it with his own money, and thereafter deals with it as his own, such money, in a question with the bank, would on his bankruptcy pass to his creditors. An exception to this is allowed in the case where the money is so ear-marked in the bank account as to be clearly traceable. Accordingly, it has been decided that money intrusted to an agent for a special purpose, and which could be clearly traced in his bank account, did not fall under a sequestration of his estates which took place a year after his death, but must be repaid to the owners (*Macadam*, 1872, 11 M. 33).

**Bank must have Voucher for Debits.**—For every debit made to the account of a customer, with the exception of interest due to the bank for sums advanced, a voucher, whether cheque, bill, or other document of debt, must be in the hands of the bank, and retained until the account is docketed by the customer, or by someone acting under his authority.

**Mandate to operate on Account.**—The following is the form of mandate usually granted by a customer to his banker when he desires to authorise a third person to operate on his account. The words in italics will be omitted where authority to overdraw is not to be allowed. The form has been adjudicated as not liable to stamp duty.

[Place and Date.]

To the Bank.

Gentlemen,

I hereby request you to honour all cheques or drafts drawn on my account kept at your office in \_\_\_\_\_ which may be signed by my clerk, Mr. \_\_\_\_\_, for me, and that even though your honouring the said cheques or drafts should have the effect of overdrawing my said account, but so as not to exceed at any time the sum of \_\_\_\_\_.

This authority to subsist until recalled in writing.

Yours faithfully,

See BANK: BANKER: BANK AGENT: BOND FOR CASH CREDIT: PAYMENTS (INDEFINITE).

**Corrente termino.**—This phrase is used in leases, and means “during the currency of a term.” A landlord with a right of hypothec may stop poinding by his tenant’s creditors unless consignation is made or sufficient security found for the hypothecated rent. In the general case, however, and apart from cause shown, sequestration by a landlord *corrente termino* is incompetent. Furniture of a dwelling-house, though sequestered, cannot be sold *corrente termino* (*Wells*, 1800, *Hume, Decisions*, 225; *Hunter*, ii. 391, 416; *Rankine, Leases*, 359). See HYPOTHEC.

**Cursing and Swearing.**—Under our ancient law the use of profane language was a statutory offence. The Acts 1551, c. 16, and 1581, c. 103, enacted that a conviction on a charge of profane swearing should be followed by a sentence of imprisonment and setting in the jugs or stocks, or, in cases of great obstinacy, by banishment. By Acts of Chas. II., 1661, c. 19, and 1661, c. 38, it was provided that the punishment of cursing and swearing should be a fine, in proportion to the rank of the offender. One-half of this was to go to pious purposes within the parish, the other half to the informer and in payment of the costs of prosecution. If the offender could not pay, corporal punishment might be imposed. The Act 1661, c. 38, committed the execution of the Statutes dealing with profanity to justices of the peace; and an Act of 1696, c. 31, empowered any person to prosecute.

No prosecution would now be undertaken for the statutory crime of profanity. The offence of cursing and swearing, when amounting to a breach of the peace, is now dealt with summarily at common law or under Police Acts, and is punished by fine or imprisonment.

[*Hume*, i. 572.] See BREACH OF THE PEACE.

**Cursing (of God).**—See BLASPHEMY.

**Cursing of Parents.**—By our former law it was a capital crime, by Statute, for a son or daughter to beat or curse a parent. The Act 1661, c. 20, provided “that whosoever, son or daughter, above the age of sixteen years, not being distracted, shall beat or curse either their father or mother, shall be put to death without mercy; and such as are within the age of sixteen years, and past the age of pupillarity, to be punished at the arbitrament of the judge, according to their deservings, that others may hear and fear, and not do the like.” The Statute made it a capital crime either to beat or to curse a parent; but, to make a relevant charge, the injury by beating must have been severe, and the cursing must have amounted to a “bitter and hostile execration” of the parent. The Statute did not extend to relationship by affinity, but it probably included grandfathers and grandmothers. The following were good defences to the capital charge under the Statute: that the offender was under sixteen years of age; that he had acted in retaliation of severe injuries inflicted on him by the parent; that at the time of offending he was “distracted,” *i.e.* that his mind was then unhunged.

This Act is now in desuetude, and an attack by a child upon a parent would be dealt with at common law as an aggravated case of assault.

[*Hume*, i. 324.] See ASSAULT.

**Cursing, Letters of.**—By the practice of the Church in Scotland prior to the Reformation, a decree of excommunication pronounced in a Church Court was followed by the issue of letters of cursing or excommunication against the person named in the decree. The object in issuing the letters was to bring the excommunicated person to repentance: but if this result was not achieved within forty days, the Civil Courts intervened on the motion of the Church authorities. By St. 2, R. i. c. 31, it is ordained that "letters of caption should be direct againis thame quha sustenis cursing be the space of fourtie dayis." The offender, being apprehended under the letters of caption, was punished by the Civil Court for his contumacy in the face of the censures of the Church. An Act of Mary of the year 1551 provided that all the moveable goods of persons who should sustain the process of cursing for one year, or who should communicate, being excommunicated, should pertain to the king, after creditors had been satisfied. Ecclesiastical authorities were liable to be punished for wrongous cursing of persons occupying public offices (Balfour, *Prædicts*, 565).

Letters of cursing were abolished at the Reformation. When the Commissary Courts were established in 1563, their decrees were enforced by the means of letters of horning and caption, which thus came in place of letters of cursing.

See EXCOMMUNICATION.

**Curtilage**, though peculiarly an English legal term, has been imported into the law of Scotland under "The Inhabited House Duty Acts" (43 Geo. III. c. 161, Sched. B, and 14 & 15 Vict. c. 36, s. 2) and "The Gun Licence Act" (33 & 34 Vict. c. 57). The word is not defined in any of the Acts, and there may be uncertainty as to its exact meaning and extent, especially under the Gun Licence Act, sec. 7 of which imposes a penalty upon "every person who shall use or carry a gun without a licence, elsewhere than in a dwelling-house or the *curtilage* thereof," with certain exceptions which are not of concern here. Curtilage, which is of the same derivation as "court," and is akin to the Scotch word "closs" or "close," has been defined as "a court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house" (Tomlins, *Law Dictionary*; see Lord Ordinary's opinion in *MacDonald*, 1896, 33 S. L. R. 719). This definition is, however, vague, and the question as to what a curtilage exactly signifies under the Gun Licence Act has never been judicially determined. In one case where the point arose, it was not seriously discussed, as it was clear that the field where the gun was fired could not possibly be held to be within the curtilage (*Commissioners of Inland Revenue*, 1881, 45 J. P. 588). In another case, the Court of Appeal reversed the decision of the justices of the peace, and held that an orchard behind the dwelling-house and its outhouses is not within the curtilage (*Asquith*, 1884, 48 J. P. 724).

According to the English authorities, a curtilage is part and parcel of a house, such as would have passed simply by the feoffment or grant of the same. Further, it is distinct from "the garden," although the garden, provided it be one "of necessity, and not of pleasure merely," would be reckoned by English law as a parcel of the house, and would pass along with the curtilage under a grant of the house.

Curtilage, moreover, is a less extensive word than garden, since, though it was never doubted that the curtilage would pass with the house, there were originally doubts as to the garden. It may therefore be assumed

that nothing which would not pass under a conveyance of a house can be curtilage. But although, as we have seen, the grant of a house may carry, as well as the curtilage, the garden as usually understood, curtilage of itself cannot be held to include an orchard and garden (*Asquith, supra*; but see Rankine on *Landownership*, 3rd ed., footnote, p. 787).

As to the meaning and extent of the term, see *Fergusson*, 1863, 33 L. J. Ch. 29; *Steele*, 1866, L. R. 1 Ch. 275; *Pulling*, 1864, 33 L. J. Ch. 505; *Lord Grosvenor*, 1857, 1 De G. & J. 446; *Marson*, 1868, 37 L. J. Ch. 483.

But although, in a strictly legal sense, there is clearly a distinction between the *garden* and the *curtilage*, there might be greater laxity allowed in interpreting the terms of a penal Statute such as the Gun Licence Act. Yet, even then, it is apparent that the curtilage is an area of very limited extent.

## Custody of Children.

### LEGITIMATE CHILDREN.

I. (1) (a) *THE FATHER*, in virtue of the *patria potestas*, has a legal right to the custody of his legitimate children during pupillarity, and, it may be, till they are forisfamiliated (*Leys*, 1886, 13 R. 1223; *Pagan*, 1883, 10 R. 1072; *Symington*, 1874, 1 R. p. 873, per Lord Deas; *Harvey*, 1860, 22 D. 1198; Fraser, *P. & C.* 68). But this right, though “deeply seated in law,” and “settled by a series of decisions of this Court (Session) as well as by our constant practice” (*Pagan, cit.*), is not absolute. It is subject to the control of the Court of Session, acting in virtue of its *nobile officium*, and as authorised by statute (*infra*). The Court, not only where the father is seeking the custody, but in all cases, therefore, will interfere, upon application, in the interests of the physical and moral welfare of the pupil, which is the primary and paramount consideration (Fraser, *P. & C.* 77 *et seq.*, and cases there; *Cameron*, 1847, 9 D. 1401; *Lang*, 1869, 7 M. 445; *Symington*, 1874, 1 R. 871, revd. 1875, 2 R. (H. L.) 41; *Stenson*, 1894, 21 R. 430, revd. 21 R. (H. L.) 96; *Morrison*, 1894, 21 R. 1071). Where, however, there is no relevant averment against the character or means of the father as custodian, his right will be sustained as absolute in questions with *third parties*. Accordingly, in *Leys (supra)*, where the paternal grandfather, a minister of the Presbyterian Church, had been allowed to bring up the children for six years, and the father had become a Roman Catholic four years before his application, and was in somewhat straitened circumstances, the right of the father was sustained (see also *Delaney*, 1889, 16 R. 753—charitable institution; *Russell*, 1873, 10 S. L. R. 314). On the other hand, where the Court are satisfied that the moral or physical welfare of the child will suffer from the father’s custody, his claim will be refused (*Markey*, 1888, 15 R. 921—charitable institution; *Moncreiff*, 1891, 18 R. 1029—custody allowed to a factor *loco tutoris*, father being in Russia). While the father’s right is absolute during pupillarity, subject to the control of the Court, the wishes and feelings of the child are entitled to great consideration after puberty (*Harvey*, 1860, 22 D. 1198; *Fisher*, 1894, 21 R. 1076; *Flannigan*, 1892, 19 R. 909, per Lord Pres.).

Where the father, or mother, or any person, having *de facto* the custody of children, is guilty of cruelty, provision is made by Statute for their being deprived of the custody. The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), provides, in sec. 1, for punishing *any person* over sixteen years who, having the custody or control of a child under sixteen years, wilfully ill-treats or neglects such child in a way likely to cause un-

necessary suffering or injury to its health. By sec. 6 (1), where any such person has been convicted of the offence of cruelty, or any of the offences mentioned in the schedule to the Act, or has been committed for trial, or bound over to keep the peace (and the parent has been proved to be party, or privy, to the offence), the Court (Sheriff or Sheriff-Substitute) may commit the custody of the child, until it reaches sixteen, to a relation, or other fit person, willing to undertake the charge, who shall have the like control over the child as if he were the parent,—the parent being bound to contribute to the maintenance on the orders of the Court. By sec. 8, the Court is to endeavour to select a person of the same religious persuasion as that to which the child belongs. The Secretary for Scotland may discharge the child from such custody at his discretion (s. 6 (4)).

The children's interests are further safeguarded by statute. The Custody of Children Act, 1891 (54 & 55 Vict. c. 3), provides, by sec. 1, that the parent's claim for custody may be refused in the discretion of the Court of Session, where he has abandoned or deserted the child, or otherwise conducted himself improperly; and by sec. 3, that in no such case shall the Court order delivery of the child to the parent, unless satisfied that, having regard to the welfare of the child, he is a fit person to have the custody. Sec. 2 empowers the Court to order repayment to any person or Board, who maintained the child, of the whole or any portion of their outlay.

Lastly, by sec. 12 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), where, on the trial of any offence under the Act, it is proved that the father, mother, or other guardian has caused or encouraged the seduction or prostitution of a girl under sixteen, the Court has power to deprive them of all authority over the girl, and appoint as guardian any person willing to take charge of her.

*In Questions with the Mother.*—Where there was no judicial separation or divorce between the spouses, the father's common-law right prevailed in a question with the wife. It was sustained where he had deserted his wife (*A. v. B.*, 1870, 42 Sc. Jur. 224); and although residing abroad, his wife being in Scotland, the father was found entitled to regulate the residence and education of his children in *Pagan* (1883, 10 R. 1072),—there being no relevant allegation against him in either case. In *Pagan's* case, Lord Pres. Inglis observed (p. 1073): "Where neither spouse is in any way disqualified for the custody and care of the children of the marriage, and there is no special circumstance of any kind, the right of the father . . . cannot be withdrawn by any discretion exercised by this Court." The rule applied more strongly where the wife had deserted her husband, with or without good reason, taking the child (*Nicolson*, 1869, 7 M. 1118; *Lilley*, 1877, 4 R. 397; *Mackenzie*, 1881, 8 R. 574; *Bloc*, 1882, 9 R. 894; *Hutchison*, 1890, 18 R. 237; see also *Beattie*, 1883, 11 R. 85). (See, however, *Gibson*, 1894, 2 S. L. T. No. 77, where a deserting and divorced mother was allowed the custody *in hoc statu* (Ld. Stormonth-Darling); and *Stewart*, 1870, 8 S. L. R. 279, where she was also allowed to retain a delicate child of five years, though living apart under a deed of separation.) The harshness of this rule became apparent in cases where the mother had good reason to abandon the husband's society, or where the wife had been deserted, and no doubt led to the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). Under that Act, the Court (Session or Sheriff, s. 9) is entitled "to take into consideration and have regard to several things which it could not competently have regarded before the passing of the Act," *cf.* the mother's wishes (*Beattie*, 1889, 16 R. 648). The Statute enacts, by sec. 5: "The Court may, upon the application of the mother . . . make such order as it may think

fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act," and may make such order in regard to expenses as it thinks just. It also provides, sec. 3 (2), that the mother may nominate a guardian to act with the father after the mother's death, and the Court may confirm such nomination. It is further provided by sec. 7, that in any case of separation or divorce, the Court pronouncing the decree may declare the offending spouse a person unfit to have the custody; and such parent shall not, upon the death of the other, be entitled as of right to the custody. In the most recent case on the subject (*Stevenson*, 1894, 21 R. 430; revd. 21 R. (H. L.) 96), it was very clearly indicated that the considerations in sec. 5 would apply not only to applications by petition for custody, but to claims made in actions of separation and divorce (per *Ld. Watson*, p. 98, and *Ld. Chancellor*, p. 99). The father as well as the mother may petition the Court, under sec. 5, for the custody, or to alter any order already issued as to the custody (*Beddie*, 1889, 16 R. 648); but the Act does not apply to bastards (*Brand*, 1888, 16 R. 315).

(2) *THE MOTHER* has, at common law, on the father's incapacity or death, right to the custody of her children during pupillarity (*A. B.*, 1850, 12 D. 1297; *Johnston*, 1849, 11 D. 718; *Campbell*, 1833, 11 S. 544; *Fraser, P. & C.* 218; though the old rule was that her right ceased in favour of the tutor on the child attaining seven years (*Borthwick*, 1845, 8 D. 318; *Ersk. i.* 7. 7; *Bell, Prin.* s. 2083). This right, however, is, as in the case of the father, not absolute, and may be controlled by the Court of Session in the interests of the child. If the mother is thought to be an unfit custodier, on the ground of her improper conduct or otherwise, she may be deprived of the custody, and the child handed over to the tutor, nominate, or at law, or dative (if he is not the next heir) (*Stair, i.* 6. 15; *Ersk. i.* 7. 7), or to the factor *loco tutoris* (*Muir*, 1868, 6 M. 1125), or some other unexceptionable third party. Accordingly, where the mother had married a second time, and residence with her was thought to be detrimental to the children's welfare, the custody was given to the father's relatives (*Denny*, 1863, 1 M. 268). Similarly, in *Muir* (1868, 6 M. 1125), because the mother was teaching the child improper habits, and in *Gulland* (1878, 5 R. 768), on the ground of her immorality, the custody was allowed to a factor *loco tutoris*, the Court ordaining him to submit a scheme for the residence and education of the child (see also Prevention of Cruelty to Children Act, 1889, s. 5). The mother, though married a second time and domiciled abroad, has been preferred as custodier of her pupil daughters, to the uncle,—their *tutor nominate*,—with whom they were residing in Scotland; and her right as guardian under the Act of 1886 (49 & 50 Vict. c. 27, s. 2, *supra*) is not affected by her second marriage (*Maquay*, 1888, 15 R. 606; cf. *Buchan*, 1842, 4 D. 1268, and *Paul*, 1838, 16 S. 824; see Lord Fraser's doubt on this subject, *P. & C.* 218). By sec. 2 of that Statute the father, and the Court on application, may nominate a guardian to act along with the mother; and by sec. 3 the mother is empowered to nominate a guardian to act along with the father after her death, if the Court shall think right; and, after the death of both, to act alone, or jointly with the father's nominee. See GUARDIANSHIP OF INFANTS ACT.

(3) Where the mother is dead or incapable, the *TUTOR*, whether

nominate, or at law, or dative, is next entitled to the custody, unless he be the child's nearest heir in whole or part, or has the same interest which the heir would have in the succession—by purchase or otherwise (Stair, i. 6. 15; Ersk. i. 7. 7; Fraser, *P. & C.* 219; *Chalmers*, 1611, Mor. 16239; *Gibson*, 1824, 3 S. 249). Where the tutor is thus, or in any other way, disqualified, the nearest cognate of the pupil will be preferred (*Higgins*, 1821, 1 S. 50; Bell, *Prin.* s. 2083). But in either case the paramount consideration for the Court will be the child's welfare.

(4) *FACTOR LOCO TUTORIS, GRANDFATHER, ETC.*—Although these parties have no legal right to the custody of pupil children, they, as well as the tutor (*Fullerton*, 1829, 7 S. 353), have been held entitled, in the interests of the child, to apply to the Court, when necessary for its protection from the improper conduct of the custodier. Accordingly, on that ground, the custody was given to the factor *loco tutoris* in preference to the mother, in *Denny* (1863, 1 M. 268), *Muir* (1868, 6 M. 1125), and *Galland* (1878, 5 R. 768); while in *Moncreiff* (1891, 18 R. 1029), where the father was resident in Russia in embarrassed circumstances, and the change would have been prejudicial to the child's health, the factor *loco tutoris* was allowed to retain her in this country. On the other hand, a father's trustees, who had arranged for a pupil's maintenance and residence in this country, were preferred, *in hoc statu*, to the guardian resident in Canada, nominated by the mother, where the guardian had made no sufficient disclosure of her circumstances (*Fenwick*, 1893, 20 R. 848). It is impossible to bring the cases under definite categories, but the following may be noted as instances of the general rule,—that the child's welfare is the leading consideration: Petition by *maternal grandfather*, the nearest cognate, *refused* in favour of stepmother (*Blair*, 1866, 4 M. 807), and his claim also *refused* in favour of uncle—nearest agnate—in *Reilly* (1895, 22 R. 879); application by *paternal grandfather* *granted* in question with guardians nominated by the mother, who had placed pupils in an institution (*McLay*, 1868, 41 Jur. 68); petition by *paternal grandmother* and uncles and aunts *refused*, as inexpedient in the circumstances, where the father in India had boarded his pupil son in this country, and expressed himself, before his death, satisfied with the care shown the boy (*Smith*, 1890, 18 R. 241); a *brother*—nearest male agnate—who had placed two pupils in a charitable institution, was *refused* the custody (*Morrison*, 1894, 21 R. 889 and 1071), where it appeared, on the report of a curator *ad litem*, that the children were well provided for, and that one of them—a girl—objected to any change, or to be separated from her twin-brother.

II. *DURING, OR AFTER, ACTIONS OF SEPARATION OR DIVORCE.*—Until 1861, the general rule, before referred to, applied in questions of separation and divorce. The husband, although the guilty party, was held entitled in law to the custody of his pupil children, unless the Court, having regard to the children's interests, should in its discretion think him unfit to be their custodier (Fraser, *P. & C.* 67; *Allan*, 1869, 41 Sc. Jur. 617; see *Harvey*, 1860, 22 D. 1198; also *Ketchen*, 1870, 8 M. 952, an aggravated case, where a divorced husband was deprived of the custody). The Conjugal Rights (Scotland) Amendment Act, 1861, s. 9, provided that: "In any action for separation *a mensa et thoro* or for divorce, the Court (Session) may from time to time make such interim orders, and may, in the final decree, make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates." It was thought that this provision might operate some relaxation of the husband's right where the mother was

the innocent party. But in *Lang* (1869, 7 M. 445), it was held that the Court had, under the Statute, no more extensive powers than it had at common law,—the Act only empowering the Court and Lord Ordinary to do incidentally what, under the *nobile officium*, they could do on a separate application (see also *Stewart*, 1870, 8 M. 821).

In *Symington*, however (1874, 1 R. 871; 2 R. (H. L.) 41), where the innocent wife, founding on the English practice, claimed the custody of all the children, the House of Lords laid it down that it was impossible to prescribe any general rule in cases under the Act, and that the whole circumstances of the particular case ought to be considered; and although deeming the father not unlikely to be a proper custodian, they allowed the mother to have the custody of the daughters, while the sons were intrusted to the father, each parent being granted a right of access. Since that date the *practice* has been to follow the example of *Symington's* case as to custody, so far as circumstances permit, having regard to the children's welfare. (If, however, the child is very young, the father's right will in no case be sustained as a matter of course. *Pendente lite*, the Court were always accustomed to regulate the custody according to what was best for the child.) (See *Cumeron*, 1847, 9 D. 1401.)

But recently, in *Beattie* (1883, 11 R. 85), where the children were with the wife, and although the wife had raised an action of separation, the Court, assuming the husband's absolute right, and disregarding the wife's wishes, followed *Lang* (*supra*), and granted the husband's petition, there being no relevant averment against him. Still later, the Court were inclined to hold that the Lord Ordinary, in actions of separation and divorce,—his jurisdiction in questions of custody being derived solely from the Conjugal Rights Act, 1861,—had no right to give any weight to the new considerations (*e.g.* mother's wishes) introduced by the Guardianship of Infants Act, 1886 (*supra*, *Beedie*, 1889, 16 R. 648).

Finally, however, the rule as to the husband's absolute right, where the pupil's welfare is not menaced, has been negatived in *Stevenson* (1894, 21 R. (H. L.) 96; revg. 21 R. 430), the House of Lords holding that the wife's averments of cruelty to herself are relevant in answer to the husband's claim for custody, and that the considerations of the 1886 Act, s. 5, can be taken into account by the Lord Ordinary in actions of separation. The Lord Chancellor (Herschell) observed (p. 99): "Surely the Act was passed for just such a case as this—as I understand it—the rights of the husband, the father, are no longer to be absolute, but if he has misconducted himself he should not be entitled to the custody as an absolute right, but the Court should consider the mother as well as the father, and consider above all the interests of the children." In *Smith* (1894, 2 S. L. T. No. 197, Ld. Wellwood), a mother, divorced for adultery, was in the special circumstances granted the custody of a girl of ten; and in *Gibson* (1894, 2 S. L. T. No. 77, Ld. Stormonth-Darling), a mother, who had deserted her husband, taking with her the only child of the marriage, a girl aged five, and was afterwards divorced for desertion, was allowed the custody *in hoc statu*.

#### ILLEGITIMATE CHILDREN.

The *prima facie* right to the custody of bastards is with the mother, and she is not irrevocably bound by an agreement, even though acted upon, to let the father have the custody (*Macpherson*, 1887, 14 R. 780, and earlier authorities there: *Sutherland*, 1887, 15 R. 224; *Corrie*, 1860, 22 D. 900; see *Simpson*, 1865, 3 M. 396). But here, again, the mother's right is not absolute: the Court are bound to consider the interests of the child, and



are entitled, if it be for the child's welfare, to disregard the mother's legal right (*Sutherland, supra*; *Campbell*, 1895, 22 R. 869; *Mackenzie*, 1892, 19 R. 963,—questioned if the Custody of Children Act, 1891, applied in an appeal from the Sheriff to the Court of Session). The mother cannot appoint a tutor except in connection with a gift of property, or nominate a guardian under the Guardianship of Infants Act, 1886 (which does not apply to bastards), and an action raised by her cannot be insisted in after her death by a person named in her settlement as tutor: but in a petition for custody by a person named as guardian in her settlement, the expressed wishes of the mother were given effect to (*Brund*, 1888, 15 R. 449, and 16 R. 315). If the mother refuses the father's offer to take the custody of the child when it has reached the age of seven, if a boy, or ten if a girl, the father's obligation to aliment ceases as a rule (*A. B.*, 1842, 4 D. 670; *Corrie, supra*; *Grant*, 1872, 10 M. 511): but the rule does not hold where it would be detrimental to the child's welfare to remove it from the mother's custody, and where the father's offer is not necessitated by his circumstances (*Brown*, 1896, 23 R. 733). The father's relations have no legal right to the child; but cases have occurred where, for the child's benefit, it was allowed to be taken from the mother at the age of seven, and delivered to trustees, to be educated in a manner befitting its fortune (*Whitson*, 1825, 4 S. 42; see *Barter*, 1825, 4 S. 141, *Id.* Craigie).

#### ACCESS TO CHILDREN.

The parent deprived of the custody is entitled to reasonable access to the child, and the father's general right to custody does not justify him in arbitrarily refusing his wife such access (*McIver*, 1859, 21 D. 1103; *Fraser, P. & C.* 69, 71; *Mackay, Pract.* ii. 368). It is usual in practice for the Court, if asked, to make an order for access in the final decree in actions of separation and divorce, but in many cases the parties themselves arrange the matter (see *Symington*, 1875, 2 R. (H. L.) 41, and at p. 975 for the order made). Where the wife left the husband without good reason, she was refused access to the only child of the marriage, aged two, as the Court does not regard with favour the *de facto* separation of married persons (*Mackenzie*, 1881, 8 R. 574 (Second Division); *A. B.*, 1870, 42 Jur. 234): but, on the other hand, in *Bloc* (1882, 9 R. 894 (First Division), and *Lilley* (1877, 4 R. 397 (First Division)), where the deserting wife was ordained to give up the children to the father, access was allowed. A wife, divorced for adultery, may at common law competently petition for access, but it will not be allowed if she is leading an immoral life (*Shirer*, 1885, 12 R. 1013); and it would appear that the Court will not, unless in exceptional circumstances, interfere with the husband's discretion as to allowing access to the mother divorced for adultery. He might as a rule, in these circumstances, forbid all communication (*Bowman*, 1883, 10 R. 1234; *Handley* (1891), Prob. 124; see, however, the change effected in questions of custody by the case of *Stevenson, supra*, CUSTODY IN JUDICIAL SEPARATION AND DIVORCE). In *Allan* (1869, 41 Jur. 617), access was allowed to the mother, contrary to a deceased husband's orders. The Court of Session has power to determine the question, on petition addressed to the Inner House at common law (*A. B.*, 1847, 10 D. 229), or under sec. 5 of the Guardianship of Infants Act, 1886 (*Sheriff Court*, see *infra*); and *pendente lite* under the Conjugal Rights Act, 1861, s. 9 (see *Beattie*, 1883, 11 R. 85, and *Stevenson*, 1894, 21 R. 430, and 617; H. L. 96).

*RELIGION*.—The father decides as to the creed in which his child is to be brought up, and cannot deprive himself, either before or after the marriage, of his discretion (Ersk. *Prin.* (Rankine), 93, and cases there). The religion in which the child is to be brought up is often of moment in questions of custody after the father's death, where the child is residing with strangers, or in an institution. The rule appears to be, that the paramount and ultimate consideration, as in questions of custody, is the welfare of the child; but the father's wishes and directions (the mother's, in case of illegitimate children,) are of the greatest weight, and will be given effect to, if possible without detriment to the child's general interests (*Brand*, 1888, 16 R. 315 (bastard); *Morrison*, 1894, 21 R. 1071, per Lords Adam and McLaren; *Reilly*, 1895, 22 R. 879). It would seem, however, that the mother's wishes would not now be totally disregarded, even in the case of legitimate children, looking to the terms of sec. 5 of the Guardianship Act, 1886 (Lord McLaren in *Morrison*, *supra*). The matter has been dealt with by Statute where the *parent* is applying for custody or production of a child. In these circumstances, if custody be refused, the Court, by sec. 4 of the Custody of Children Act, 1891, has power to secure that the child may be brought up in the religion which the parent has a "legal right" to require, but "nothing in this Act shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice." Further, where under sec. 5 of the Prevention of Cruelty to Children Act, 1889, the Court commits a child to the charge of a third party, it shall (2) endeavour to ascertain the child's religious persuasion, and shall, if possible, select a person of the same persuasion, and specify such in the order; or change the custodier, if not of the same religious persuasion as the child.

*WISH OF CHILD WHEN MINOR PUBES*.—In regard to residence, etc., the wishes of the child if *minor pubes* will, as a rule, be given effect to. The question generally arises when the child has been already removed from its natural custodier. "It would require a very strong case of conflict between the wishes of a young person on the one hand, and his or her welfare on the other, to justify the Court in refusing residence against the minor's wish" (Ld. Pres. Robertson in *Flannigan*, 1892, 19 R. 909. The minors' wishes were given effect to in *Harvey*, 1860, 22 D. 1198; *Fisher*, 1894, 21 R. 1079; *Flannigan*, *supra*; Custody of Children Act, 1891, s. 4).

*COURTS AND PROCEDURE*.—(1) *Court of Session*.—Applications for permanent custody, and for access, should be made to the Court of Session (see, however, *Brand*, 1888, 15 R. 449), by petition to the Inner House under the *nobile officium* (Mackay, *Pract.* i. 209, ii. 267; Fraser, *P. & C.* 81, 131; *Reilly*, 1895, 22 R. 879; *Morrison*, 1894, 21 R. 889, 1071; *Leys*, 1886, 13 R. 1223; *Sheriff Court*, see *infra*). In vacation, application may competently be made to the Lord Ordinary on the Bills (*Edgar*, 1893, 21 R. 59, Ld. Kinnear). Under the Guardianship of Infants Act, 1886 (ss. 5 and 9), a petition may be presented to either Division of the Court, or to the Lord Ordinary on the Bills (*Sheriff Court*, *infra*). The Custody of Children Act, 1891, appears to apply only to petitions presented in the Court of Session; and it has been doubted if it applies to petitions brought up on appeal from the Sheriff Court (*Mackenzie*, 1892, 19 R. 963). As before stated, the Lord Ordinary may deal with the questions of custody and access

incidentally in actions of separation or divorce (Conjugal Rights Act, 1861, s. 9), even although there is no conclusion to that effect in the summons (*Symington*, 1874, 1 R. 871); but any order dealing with custody is incompetent after final decree (*Lang*, 1869, 7 M. 445). The procedure must thereafter be by petition. Even while an action of divorce is pending, a petition for custody or access is competent, but the Court will exercise this jurisdiction only in exceptional circumstances (*McCallum*, 1893, 20 R. 293). When an order for custody has been granted, without or after answers, and there is wilful failure to implement, the usual procedure is to ordain the defaulting party to appear at the bar of the court, and, on failure to appear or to agree to deliver up the children, to sequestrate his estates (*Fisher*, 1894, 21 R. 1076; see *Ross*, 1885, 12 R. 1351, where wife left the country), or imprison him for contempt of Court (*Leys*, 1886, 13 R. 1223).

(2) *Sheriff Court*.—The Sheriff may, in cases of emergency, regulate the interim custody of children (Fraser, *P. & C.* 81; *Mackenzie*, 1892, 19 R. 963; *Hood*, 1871, 9 M. 449; *Stewart*, 3 S. L. R. 405). He has no power at common law to deal with the question of permanent custody where an appeal is made to his discretion as to who shall have it (Fraser, *P. & C.*, *supra*); but no question of *status* being involved, he may interfere to give effect to the legal right of a parent (*Brand*, 1888, 15 R. 449; *Mackenzie*, *supra*). By the Guardianship of Infants Act, 1886, s. 5 (49 & 50 Vict. c. 27), the Sheriff may, on the application of the mother, make any order as to the custody of, or right of access by either parent to, a child that he thinks just (*Sleigh*, 1893, 30 S. L. R. 272; see *A. v. B.*, 1889, 6 S. L. R. 6, where Sheriff Spens held that the provisions of the section were not inapplicable, where the mother was in the position of defender).

(Bankt. i. 6. 1; Stair, i. 5. 3; Ersk. i. 6. 53 and 56, i. 7. 7; Bell, *Prin.* ss. 2068, 2083; Ersk. *Prin.* (Rankine), pp. 73, 93; Fraser, *P. & C.* 65, 77; Walton, *H. & W.* 72.)

See PARENT AND CHILD; PUPIL; BASTARD; GUARDIANSHIP OF INFANTS ACT; PATRIA POTESTAS; FORISFAMILIATION.

**Custom.**—Fixed usage or practice—local or general—the source of consuetudinary law. See CONSUETUDINARY LAW; USAGE; CUSTOM OF TRADE; STATUTE; DESUETUDE.

**Custom of Trade.**—Every species of contract—sale, location, etc.—has possible reference to various species and sub-species of subject-matter. The contract of sale, for example, may have either land or goods for its subject-matter, and, in the case of goods, any kind or description. Viewed merely as a contract, the sale of land does not differ from the sale of goods; but viewed further as to subject-matter, the contract of sale branches out into two different types, each marked by its own peculiarities. So also, when the sale of goods is alone in question, but different kinds of goods are in different instances the subject-matter of the contract. Whatever be the contract, and whatever its subject-matter, there is, with regard to the contract as related to the subject-matter, a constant tendency to uniformity of practice, throughout this or that district, and in the long-run, if the subject-matter be not purely local, throughout the country. Such uniformity, once it has been established in respect of any point or points, is the relative custom or usage of trade, local or general, as may be.

In the construction of written contracts, proof of the custom of trade

is often allowed to augment or qualify the evidence afforded by the writing itself as to the intention of parties. Contracts *in re mercatoria* have especially a claim to be interpreted in this way, because they are in general expressed with brevity, on the common understanding of parties that whatever is relevant but omitted is to be supplied by reference to the custom of trade. But even mercantile contracts are in Scotland construed thus with important reservations; and, for the rest, the Scots decisions show the policy of the law to be adverse to the easy reception of evidence about the custom of trade in supplement or explanation of a written document. The recent trend of English juristic opinion is in the same direction (*Hutton*, 1835, 1 M. & W. 475; *Johnstone*, 1840, 11 A. & E. 557; *Trueman*, *ib.* 597, per Ld. Denman).

The competence of proof of custom to aid in the construction of a written contract depends on the presence of these two conditions: (1) that both parties, when they made their agreement, were aware of the custom, and (2) that, on a consideration of the wording of the instrument, they must be presumed to have contracted with reference to the custom. Proof of custom, then, is excluded where there is anything to indicate that the parties, having had the custom in view, did not mean to let it govern their relation (*Gordon*, 1831, 9 S. 735; *Gye*, 1832, 10 S. 512; *Alexander*, 1847, 9 D. 524), and *à fortiori* where the express stipulations of the contract are at variance with the custom (*D. Roxburgh*, 1820, 2 Bli. 156; *Gordon*, 1826, 2 W. & S. 115; *Scott*, 1827, 6 S. 233; *Gordon*, 1828, 3 W. & S. 1; *Shireff*, 1854, 17 D. 177; *Holman*, 1878, 5 R. 657). The presumption that the parties intended to import the usage of trade arises only in respect of matters as to which the written contract neither explicitly nor inferentially makes provision (*Hamilton*, 1824, 2 S. 611; *Hutton*, 1830, 5 Murray, 157; *Jack*, 1865, 3 M. 554), and arises most frequently in connection with mercantile transactions (*Burbidge*, 1832, 10 S. 520; *Schuurmans*, 10 S. 839, and 11 S. 779), though even in that connection the presumption does not arise, if the writing appear from its definiteness and detail to be a full expression of the agreement between the parties (*Gye*, *supra*; *MacKenzie*, 1856, 3 Macq. 22). In absence of the presumption, parole evidence is inadmissible to elucidate even a mercantile contract, save as to technical terms and phraseology: for it is the function of the judge, and not of the jury, to construe the writing (*Culder*, 9 S. 777, *affd.* 5 W. & S. 410; *Haldane*, 1842, 4 D. 1307; *Milne*, 1843, 6 D. 355. But see *McLaggan*, 1813, Hume, 101). Technical words, or words which, although in common use, bear, as used in the contract, a peculiar meaning, must be made intelligible to the Court, in order that effect may be given to the true intention of parties; and to this end, even in contracts which the custom of trade is not allowed to affect in any other way, evidence is competent to show the import of the words according to the trade usage, and, as a necessary preliminary, to establish the fact of the trade usage (*Bell*, *Com.* i. 456: cf. Ld. Ellenborough in *Robertson*, 1803, 4 East, 135).

Where evidence of custom is competent, the custom must be shown to be, not indeed absolutely unbroken (*Burbidge*, *supra*), but so generally followed as to warrant the belief that both parties had it in mind, on their entering into the contract, as the rule to be observed and relied on (*Morrison*, 1823, 2 S. 434; *Armstrong*, 1875, 2 R. 339; *Holman*, *supra*, per L. P. Inglis). Further, the custom must be one which is not contrary to law, and which is consistent with the terms of the written agreement (*Culder*, *supra*; *Sinclair*, 1868, 7 M. 273). In mercantile affairs, if there be a difference between local and national custom, and if either the local

or the national custom has to be supposed as implied in a particular contract, the national custom will in most cases be held to be the one implied, since the local custom is less likely to have been known to both parties (*Mackenzie, supra*). This holds even as to mercantile guaranties, the limitations in which are *strictissimi juris*, except where a custom of trade can be founded on (*McLaygan, supra: Tennant*, 1859, 21 D. 631). Local custom, on the other hand, will ordinarily be that held to modify contracts which are not in the narrower sense mercantile, provided the custom be prevalent over the district to which the parties belong, or with which they are connected, and in which their engagements to each other are to be fulfilled. Thus where a lease requires to be construed in the light of extrinsic evidence, the custom of the district in which the subjects are situate will be admitted, on condition of its being shown to be really the custom of the district, and not a mere peculiarity of practice in, at most, some few instances (*Alexander, supra: McLeod*, 1809, Hume, 842: *Allan*, 1829, 7 S. 784; *M. Tweeddale*, 1824, 2 Murray, 563). On the same principle will be construed a contract of service (*Ker*, 1670, Mor. 8470: *Watt*, 1703, Mor. 8472: *Forbes*, 1827, 6 S. 75), or any contract which indicates a special rather than a general usage as having been within the contemplation of the parties (*Neilson*, 1844, 6 D. 622). To make good an averment of local custom, it is not sufficient to establish that such or such a step is commonly taken in a given state of facts, because the repeated taking of the same step by different persons in the same circumstances may be due to some popular fallacy or mistake (*Nisbet*, 1880, 7 R. 575: *Brown*, 1876, 3 R. 788: *Anderson*, 1866, 4 M. 765).

Apart from the existence of a custom of trade, whether general or local, but in such circumstances as are proper for reference to a custom of trade, a course of dealing between the parties to a contract will be admitted to explain the contract: and, even though it have taken place after the date of the contract, will be of effect, *exceptione personali*, to qualify one way or another the substance of the contract (*Mags. of Dunbar*, 1835, 1 S. and M.L. 134: *Laird*, 1882, 9 R. 711, affd. 1883, 10 R. (H. L.) 77: *Heriot's Hosp.*, 1830, 4 W. & S. 98: *Masters and Seamen of Dundee*, 1830, 8 S. 547: *Girdwood*, 1830, 9 S. 170). But a course of dealing cannot be proved from one or two transactions between the parties,—as, for example, when there has been a single act of purchase previously to the date of the contract the construction of which is in question (*McMullan*, 1882, 9 R. J. C. 36).

Not only is there by the custom of trade in certain industries which have been long established, such as those carried on by calenderers, packers, auctioneers, etc., a right to retain for a general balance (*Strong*, 1878, 5 R. 770: *Miller*, 1881, 8 R. 489), but in some cases, and notably in the case of bleachers, where goods are sent out as they are ready, and accounts are paid annually or at other regular intervals, there is a right, grounded on a course of dealing, to retain any parcel of goods in respect of the continuous account from one period of settlement till the next (*Anderson's Tr.* 1871, 9 M. 718). See RETENTION.

What is held in England to be a custom of trade will, by reason of its being there so held, not require a burdensome proof to establish it as a custom of trade in Scotland also (*Strong, supra*, per Ld. Gifford).

Unless usage be averred on record and be covered by the issue, no proof of it, with a view to the construction of a written contract, will be allowed (*Milne, supra: Mackenzie, supra: Guthrie*, 1846, 19 Sc. Jur. 69).

In proving the tenor of a document which has been lost or destroyed,

evidence, in support of the adminicles, is competent as to the custom of trade with reference to those matters which the document is alleged to have contained (*Crawford & Lindsay* peerage case, 1848, 3 Cl. and Fin. 534; 13 D. (H. L.) 32; *Brown*, 1851, 13 D. 1355; *Dickson*, *Evidence*, 1097).

Besides serving, under the conditions which have now been stated, to explain and more or less to qualify the import of written contracts, the usage of trade is recognised to some other effects in law. Thus, in the valuing of future debts under the Bankruptcy Statutes, although the interest to be deducted is in general, and in the absence of express stipulation, calculated at five per cent., the usage of trade, where such usage is well established, operates on its being proved, not only to fix the rate, but also to determine the time from which the interest is to run (*Crawford*, 1812, F. C.). And by sec. 52 of the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), a creditor in a future debt is entitled to vote and rank for it, only after deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it. This enactment strikes at the creation of an undue preference, but is subject to the common-law proviso that the discount must be of an amount sanctioned by an acknowledged rule of trade, and not suggested by a variable practice (*Duncan*, 1879, 6 R. 582).

Different agricultural and commercial customs have given rise to numerous questions of international private law. Among points which may be taken as settled are these: that a lease of Scots land made abroad will be construed in Scotland with reference to the agricultural customs of Scotland; that in an action on a policy of insurance with a Scots company, the equipments of sails, etc., must conform to the usage of this country rather than to that of the country where the vessel was built and where it is owned (*Cook*, 1843, 5 D. 1379); and that in a contract of sale of timber the usage at the port of delivery determines the mode of measurement (*Schuurmans*, *supra*).

**Customs** are duties imposed from time to time upon certain commodities, imported and exported, and are thus distinguishable from excise duties, which are imposed upon the consumption of the commodity, and will be treated of under the article **EXCISE**. The 18th Article of the Treaty of Union declares that the laws concerning trade, customs, and excise are to be the same in both kingdoms. The whole provisions regulating the management of the customs are entirely statutory. The Statutes relative thereto are very numerous, and have been frequently consolidated. The last consolidating Act is The Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), which repeals, with certain minor exceptions, all prior Statutes, and, as amended by 40 & 41 Vict. c. 13; 42 & 43 Vict. c. 21; 46 & 47 Vict. c. 55; 47 & 48 Vict. c. 62; 52 & 53 Vict. c. 42; and 53 & 54 Vict. c. 8, is the law at present in force regulating customs. The collection and management of the customs of the United Kingdom are under the control of the Board of Customs, which consists of any number of commissioners not exceeding five, appointed by the Crown. All duties, penalties, and forfeitures incurred under, or imposed by, the Customs Acts, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted, determined, and recovered by action of debt, information, or other appropriate proceeding in the Court of Session, as the Court of Exchequer in Scotland, in the name of the Lord Advocate, or of some officer of customs or excise, or by information in the name of some officer of customs or excise before one or more justice or justices. All suits, indictments, or informations

brought or exhibited for any offence against the Customs Acts shall be brought or exhibited within three years next after the date of the offence committed. See SMUGGLING.

**Custos rotulorum.**—See JUSTICE OF PEACE.

**Cy-près.**—"Near to it."—The doctrine of *cy-près*, or approximation, is, strictly, a doctrine of English law. In Scotland, however, the phrase is applied, rather loosely perhaps, to the principle on which the Court deals with cases of bequests for charitable purposes, where, owing to the lapse of time, or to a change of circumstances, it has become impossible to carry out the main object of the testator by a strict adherence to the directions laid down by him. In such a case, the Court, as a Court of equity, has "always exercised the power of varying the means of carrying out the charity from time to time, according as by that variation it can secure more effectually the great object of the charity, namely, the benefit of the beneficiary" (per Lord Westbury in *Clephane*, 1869, 7 M. (H. L.) 7). Not only will the Court vary the means by which a charitable trust is to be carried out, but it will in some cases substitute for an object which has failed, another object of a similar nature. These latter cases show the application of the doctrine of *cy-près* in the stricter sense of the phrase. The action of the Court will depend upon the interpretation given to the truster's intention. Where the bequest has been made for a certain definite charitable purpose, and that purpose has failed during the truster's lifetime, the Court will not substitute another (*Rymer* [1895], 1 Ch. 19). But where the charity named exists at the date of the truster's death, although it fails before the legacy is paid, or where the general intention of the truster clearly is that his money shall be used for charitable purposes, and shall not go to his heirs, the Court will not allow the failure of the charity pointed out by the truster to defeat his intention, but will select another object, regarding as closely as possible any indications which may be given in the trust deed (*In re Sherin* [1891], 2 Ch. 236). In making such a selection, the Court will take care that it does not thereby sanction the application of the money of a charitable trust to purposes for which it is lawful to impose rates, or to which public money is already dedicated (*Kirk Session of Prestounpans*, 1891, 19 R. 193; *Anderson's Trust*, 1896, 33 S. L. R. 430). The following cases may be noted as examples of authority given to adapt the administration of a charitable trust to altered circumstances: *Clephane*, 1869, 7 M. (H. L.) 7, where a hospital belonging to an old charity had been sold to a railway company, and the Court held that the intentions of the truster could be better carried out by the institution of a system of outdoor relief, than by the rebuilding of the hospital. *Burnet's Trustees*, 1876, 4 R. 127, where the trustees were authorised to grant bursaries to the beneficiaries, in place of paying apprentice fees, as directed by the trust. *Downie*, 1879, 6 R. 1013, where heritable subjects, which had been disposed for the purpose of founding and maintaining a Roman Catholic school, had proved to be unsuitable for the purpose, and the trustees were empowered to sell the property and purchase subjects of a more convenient description. *Glasgow Royal Infirmary*, 1887, 14 R. 680, where trustees were authorised to expend the trust money on the erection of a nurses' home, in place of a fever convalescent home, for which it had been destined, and which had become unnecessary. *John Watt's Hospital*, 1893, 20 R. 729, where trustees

were authorised to sell a hospital which had been founded by a testator who died in 1829, and which was benefiting a different class of persons from that contemplated by the founder, and to apply the income of the trust in the future in payments for outdoor relief. *Trustees of Carnegie Park Orphanage*, 1892, 19 R. 605, where an alteration was made in the limit of age fixed by the truster as a qualification for admission to the orphanage. *Trustees of John Reid Prize*, 1893, 20 R. 938, where alterations were made in the qualifications necessary for candidates for the prize. (See also *McDougall*, 1878, 5 R. 1014; *University of Aberdeen*, 1869, 7 M. 1087.)

In all such cases, the usual procedure is a petition, presented to the Court by the trustees, followed by a remit by the Court to some person to inquire into the circumstances of the trust, and to report, and, if the report is in favour of a change in the administration, to draw up a scheme giving effect to the proposed change for the approval of the Court.

The doctrine of *cy-près* is not applicable to the case of a friendly society (*Cunnack* [1895], 1 Ch. Div. 489).

In England, the doctrine of *cy-près* is also applied to cases in which conditions, subject to which legacies have been bequeathed, have become impossible of fulfilment, owing to no fault on the part of the legatee. The effect of the application is to enable the legatee to take his legacy upon fulfilling the conditions to the best of his ability, or as nearly as possible.

[Boyle on *Charities*, 147-280; McLaren on *Wills*, ii. 926.]

See CHARITABLE TRUSTS; EDUCATIONAL ENDOWMENTS ACT.

**Daily Council.**—Prior to the institution of the College of Justice in 1532, attempts had been made to establish a permanent Supreme Court of Justice separate from Parliament. In 1425, James I. established the *Session* to sit three times in the year, in such places as the king should appoint.

Irregularities and confusion having arisen, James IV., in 1503, instituted the *Daily Council*, to sit continually in Edinburgh, or where the king had his residence. Neither of these Courts had appellate jurisdiction, or jurisdiction in questions of heritable rights. The Court of Session succeeded to all their powers and authority.—[Mackay, *Practice*, i. 16.]

**Dairies, Cow-sheds, and Milk-shops.**—I. The business of persons carrying on the trade of cow-keepers, dairymen, and milk-sellers is regulated by an Order of the Privy Council, known as "*The Dairies, Cow-sheds, and Milk-shops Order of 1885*," and "*The Dairies, Cow-sheds, and Milk-shops Amending Order of 1887*," passed by the late Board of Supervision, and confirmed by the Secretary for Scotland. Their authority rests upon sec. 34 of the Contagious Diseases (Animals) Act, 1878, which empowered the Privy Council to make orders for regulating the trade of persons selling milk, and subjecting them to the control of the Local Authority under the Act: and upon sec. 9 of the Contagious Diseases (Animals) Act, 1886, which transferred the powers and duties under the first-named Act to the Board of Supervision, and the Local Authorities under the Public Health Act, 1867. A further transfer has since been effected by the Local Government (Scotland) Act, 1894, which substitutes the Local Government Board for the Board of Supervision. The Privy Council Order of 1885 provides:—



*Registration of Dairy-men and others.*—6 (1). A person may not trade as a cow-keeper, dairyman, or purveyor of milk unless he is registered. (A seller of ice-cream is not a purveyor of milk in the sense of this enactment—*Pianta*, 21 R. (J. C.) 20.) (2). Every L. A. must keep a register of persons so trading. (3). They must register every such person, but registration does not authorise the use of any building as a dairy, etc., or preclude proceedings for infringement of regulations. (4). Notice of necessity for registration, and mode thereof, must be given. (5, 6). A person trading for the purpose only of making and selling butter or cheese, or selling milk in small quantities to his workmen or neighbours for their accommodation, need not be registered.

*Construction and Water Supply of New Dairies.*—7 (1). No building may be occupied as a dairy, etc., which is not so used at the commencement of the Order, unless lighting, ventilation, cleansing, drainage, and water supply are provided to the satisfaction of the L. A. (2). A month's written notice must be given to the L. A. of intention to occupy such a building.

*Sanitary State of all Dairies, etc.*—8. No building may be occupied as a dairy, etc., whether so occupied at the commencement of the Order or not, unless the ventilation, etc. (as above), are sufficient for (a) the health of the cattle; (b) the cleanliness of the milk vessels; (c) protection of the milk against contamination.

*Contamination of Milk.*—9. A milk-seller, if suffering from a dangerous infectious disorder, or having recently been in contact with a person so suffering, must not milk cows, or handle milk vessels, or in any way take part in the conduct of his trade: nor may he permit any such person to do so, until in each case all danger of contamination has ceased.

10. A dairyman must not permit any water-closet, cess-pool, etc., to remain in communication with any milk-store after a month's notice from the L. A. 11. No milk-store, etc., may be used as a sleeping-apartment, or for any purpose incompatible with its cleanliness, or likely to cause contamination. 12. Swine must not be kept in any cow-shed or milk-store.

*Regulations of Local Authority.*—13. A L. A. may make regulations for (a) inspection of cattle in dairies; (b) lighting, ventilation, cleansing, drainage, and water supply; (c) securing the cleanliness of milk-stores and milk-vessels; (d) prescribing precautions to be taken against contamination. 14. Such regulations (1) must be published in a local newspaper; (2) must be sent to the Local Government Board a month before coming into force; (3) may be revoked by the Board as too restrictive, or otherwise objectionable.

*Existence of Disease among Cattle.*—15. Where disease exists among cattle in a dairy, the milk of a diseased cow must not be (a) mixed with other milk; (b) sold or used for human food; (c) used as food for swine or other animals, unless boiled. "Disease" means cattle plague, pleuropneumonia, or foot-and-mouth disease (Contagious Diseases (Animals) Act, 1878, s. 5).

*Offences and Penalties.*—By sec. 9 (5) of the Contagious Diseases (Animals) Act, 1886, and the Order of 1887 above mentioned, the penalty for an offence against the Order of 1885 is £5, but a less penalty may be imposed. Such offences may be prosecuted summarily, in the same manner as offences against the regulations of a L. A. under the Public Health Act, 1867.

The following enactments have a direct bearing upon the regulation of dairies:—

II. *The Cattle-Sheds in Burghs (Scotland) Act*, 1866. — It provides: The magistrates of royal and parliamentary burghs are to require all cattle-sheds, cow-houses, and byres to be inspected by an officer appointed by them, and, if found suitable, to be licensed for one year; and empowers them to make regulations for the sanitary condition of the same, and to fix in each licence the number of cattle to be kept in each cattle-shed, etc. The penalty, on conviction before any two magistrates, for keeping cattle without such licence, or violating any of its conditions, or the aforesaid regulations, may be £5, and a like penalty for each day of continuance after conviction (s. 3). Similar powers are given to the commissioners of police burghs (s. 4). The magistrates before whom a person is convicted may give written notice requiring the owner or occupier of any cattle-shed, etc., to make such sanitary improvements as they may direct, within a month; and, in case of failure, may suspend his licence for not longer than a month, in addition to the penalty; on conviction of a second or subsequent offence, may revoke his licence, in addition to the penalty; in such case the magistrates or commissioners may refuse to grant the offender any licence whatever (s. 5). Every licence, not suspended or revoked, is to endure for a year; no fee is payable in respect thereof; and it must be renewed every year. The penalty for using a cattle-shed, etc., without a licence, is £5; and the fact that cattle have been taken into the burgh is to be deemed sufficient *prima facie* evidence (s. 6). Fourteen days' written notice must be given of intention to apply for a licence.

III. *The Burgh Police (Scotland) Act*, 1892, s. 287, provides that the Cattle-Sheds Act may be enforced by the magistrates of a burgh, and offences and penalties may be tried and recovered before the magistrate, as in the case of police offences under the Burgh Police Act. Sec. 121 of the same Act provides that all stables and byres are to be kept clean to the satisfaction of the sanitary inspector, under penalty of 20s. for each offence: and the inspector is to inspect from time to time all such places, with a view to the enforcement of the Act.

IV. By sec. 16 (c) of the Public Health Act, 1867, any stable, byre, pig-stye, or other building in which any animals are kept in such a manner as to be injurious to health, and by sec. 16 (e) any business so conducted, is declared to be a nuisance under the Act, and may be dealt with at the instance of the L. A.

[29 Vict. c. 17; 30 & 31 Vict. c. 101; 41 & 42 Vict. c. 74; 49 & 50 Vict. c. 32; 55 & 56 Vict. c. 55; 57 & 58 Vict. c. 58; Skelton, *Handbook of Public Health*; Dykes and Stuart, *Manual of the Public Health Acts*.]

**Damages, Measure of.**—Damages are the pecuniary satisfaction due by a party who has committed a breach of obligation to the party towards whom the obligation existed. Damages are awarded on the theory that they put the pursuer in the same position as he would have been in had the obligation of whose breach he complains been fulfilled. The remedy is equally available in breach of contract and in delict; and although there may be alternative remedies, it may be said generally that a claim of damages is competent in every case where there has been a legal wrong. The object of awarding damages being satisfaction to the injured party, and not punishment of the defender (neglecting for the moment those cases in which the conduct of the defender is a ground of aggravation), the view of the law is directed to the position of the pursuer, and not to that of the defender. The amount of injury the pursuer has suffered is considered

in calculating the sum to be awarded; and the conduct of the defender or the profit he might make by the breach of obligation are, as a rule, irrelevant to the inquiry. The means of the defender have still less to do with the case. Neither in actions for breach of promise of marriage, although the position of the defender may be proved generally in order to show what the pursuer has lost (*Somerville*, 1896, 23 R. 576; *A. v. B.* 1875, 12 S. L. R. 621; *contra Smith*, 1857, 1 C. B. (N. S.) 660), nor in those at the instance of a husband against the seducer of his wife, will the Court allow an inquiry into the amount of the defender's income (*Kryes*, 1886, L. R. 11 P. D. 100). The damages to be awarded may range from the smallest coin of the realm, when the award is intended to mark merely the invasion of a legal right without appreciable injury, to amounts which are limited only by the value of human life and the magnitude of contracts. The amount is always a jury question, but in arriving at their decision the jury are subject to certain rules of law. These may be definite enough to render the assessment of damages merely a question of calculation, or so vague as to leave the jury the widest discretion. In breach of contract, speaking generally, there are fairly definite and positive canons for regulating assessment, while in delict the rules are vague and negative.

#### I. GENERAL RULES IN CONTRACT AND DELICT.

*Damnum absque injuria.*—Damages being due only in respect of a wrong, it follows that none can be given where a wrong has not been the cause of pursuer's loss, or where there is *damnum absque injuria* (*Mogul Steamship Co.*, 1892, A. C. 25). Under this head, in contract, falls the class of cases where the plea that there is no *jus quasitum tertio* is sustained as a defence. Thus where a legatee loses his legacy through the negligence of a law agent employed by the testator (*Robertson*, 1861, 4 Macq. 167), or where a beneficiary loses money through a bad investment of trust funds in consequence of wrong advice given by the law agent of the trust to the trustees (*Raes*, 1889, 16 R. (H. L.) 31), he has no action against the law agent (see also *Blumer & Co.*, 1874, 1 R. 379; *Campbell*, 1891, 19 R. 282; *Tully*, 1891, 19 R. 65; and TITLE TO SUE). Another example of loss without injury is found in the case of a bank refusing further advances on a cash-credit bond, and executing diligence on bills it holds, so that pursuer is made bankrupt (*Johnston*, 1858, 20 D. 790; *Wallace*, 1867, 5 M. 274). In delict, on the other hand, there is said to be *damnum absque injuria* where a person by lawful operations on his own property causes damage to his neighbour, as by sinking a well which draws off the water from that of his neighbour (*Chusemore*, 1859, 7 H. L. 349; *Blair*, 1870, 9 M. 204); or where an upper proprietor throws flood-water on the land of a lower through the erection of an embankment involving no risk of damage except from some extraordinary cause (*Filshill*, 1887, 14 R. 592; *Murdoch*, 1881, 8 R. 855).

*Injuria absque damno.*—Where there is *injuria absque damno*, the exact converse of the above does not hold good. A legal wrong always carries with it a right to some damages; but where no distinct loss can be shown, the damages will be only nominal. Thus in contract, mere delay in fulfilment, as in failing timeously to deliver goods bought, will not, where there has been no serious inconvenience, found a claim for substantial damages. But a contract cannot be broken even in respect of time without the party aggrieved being entitled to claim nominal damages (*Webster*, 1875, 2 R. 754; *Clark*, 1872, 10 S. L. R. 152). Similarly in delict, an invasion of a person's legal rights will *ipso facto* be a good

ground of action. A pursuer was held to have stated a relevant case where he alleged that he had occupied under a lease, which he had renounced sometime prior to the date of raising his action, a portion of a mineral field which he never wrought, and that during his tenancy a large quantity of minerals had been secretly abstracted by the defenders, who were tenants of an adjoining coal-working, although he did not show how he had sustained any actual damage (*Bell*, 1867, 5 M. 298).

*Remoteness of Damages.* — The law follows the consequence of a wrongful act only within limits; and where an injury is only remotely connected with the alleged cause, an action will not lie. This rule is equally applicable whether damages are claimed for breach of contract or delict (*Cobb*, 1893, L. R. 1 Q. B. 464). "The first, and in fact the only inquiry in all cases is, whether the damage complained of is the natural and reasonable result of the defendant's act: it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act" (per Brett, M. R., in *The Notting Hill*, 1884, L. R. 9 P. D. 113, quoting from Mayne on *Damages*, p. 48). In other words, it is the immediate which the law regards as the real cause; and where the defender's act is one cause, but other occurrences have conjoined with it to produce the result, some of these may be regarded as severing the causal connection between the defender's act and the result complained of, and as being the proximate or true cause. For instance, it was held that a breach of contract in supplying late instead of early cabbage seed, which should have been noticed by the pursuer long before the plants raised from the seed were ready for sale, would not support a claim of damages on account of (1) claims damages by the purchasers of the plants; (2) loss of business arising from disappointment of customers, leading them to give up dealing with pursuer. The proximate cause of the mistake of the customer's getting late instead of early plants was the omission of the pursuer to notice that the plants which he sold to his customers were late cabbages, and that was not a natural consequence of the defender's breach of contract (*Wilson*, 1894, 21 R. 732). Where, also, wrong turnip seed was supplied to pursuer, and in consequence the turnips were destroyed by frost, pursuer was found not entitled to damages for loss sustained on account of not having sound turnips to fatten cattle (*Taylor*, 1868, 6 S. L. R. 95). The rule was also applied in a case where defenders, having failed to pay charges for repair of their ship, pursuers detained it on their slip in security of the amount, and afterwards sued for damages in respect of their slip being occupied by the vessel, and their trade in repairing vessels being thus interfered with. It was said that, as a general rule, consequential damages are not due for inconvenience or loss arising in consequence of non-payment of a debt, and that a tradesman or manufacturer, retaining for his own security the goods and property of his employer, is not entitled to make profit or stock in trade of that transaction (*Stephen*, 1861, 24 D. 162; see *Interest*, p. 68).

In the above cases the reason for holding the pursuer disentitled to damages is that some action or inaction of his own has prevented the defender's breach of obligation from being the proximate cause of the loss; but the rule as to remoteness is also applicable where pursuer, without any failure of duty on his part, has suffered damage, if the damage is only indirectly connected with the breach complained of. In a leading case, where the female plaintiff had been carried to a wrong railway station by a breach of contract on the part of a railway company, and, being unable to find accommodation, was compelled to walk five miles in the rain at night, and in

consequence caught cold, and was laid up and unable for some time to attend to her business or family, Cockburn, C. J., said that, in order to recover: "You must have something flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. In this case, the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go (for which damages were given). It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence. . . . it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place and having to walk home" (*Hobbs*, 1875, L. R. 10 Q. B. 117; *Wallon*, 1835, 7 C. & P. 392, 394).

But damage, though remote in the sense of not being immediately connected in time and place with the cause of loss, may be recovered if it appears that there is a true causal connection with defender's act. Defender was held liable where the breach of contract was taking a hired riding horse off the road and galloping it in a field, and the consequences were that it split its pastern bone; was laid up for six weeks; being deprived of exercise, took inflammation of the bowels; and being, on account of its condition, a worse patient, died (*Seton*, 1880, 8 R. 236; *McMahon*, 1881, L. R. 7 Q. B. D. 591; *Halestrap*, 1895, 1 Q. B. 561). In another case, a fall, which dislocated plaintiff's shoulder, was found to be the cause of his death from pneumonia, as his catching cold, and the fatal effects of the cold, were both due to the condition of health to which he was reduced by the accident (*Isitt*, 1889, 22 Q. B. D. 504).

In actions founded on delict or negligence, the rule as to consequential damage, though stated in the same terms (*Allan*, 1864, 2 M. 873), is applied in a way less favourable to the defender than in the case of contract. A person who has been negligent is in general liable for all the damage to which his negligent act has contributed. While a breach of contract which would not have produced injurious consequences of itself, does not imply liability, a delict, though it becomes operative only through the accompanying negligence of someone else, may render the person originally in fault liable. But if the injurious occurrence is not one which the negligent person ought to have foreseen, he will not be held responsible (*Fairbanks*, 1872, 10 Amer. Rep. 664; *Sharp*, 1872, L. R. 7 C. P. 253). Consequently, a person who negligently injures the servant of another, is not liable to his master in damages for the loss of his service (*Allan*, 1864, 2 M. 873); nor is one who, by stopping up a public footway on his own land, causes members of the public to trespass on his neighbour's, responsible for the damage done by the trespassers (*Blugrare*, 1856, 1 H. & N. 369; *Scholes*, 1870, 21 L. T., N. S. 835); nor a railway company, which negligently allows its carriages to be overcrowded, for an assault and robbery committed on a passenger (*Pounder*, 1892, 1 Q. B. 385; and see *CULPA TEXET SUOS AUCTORES*). But where the acts of an intermediary are the natural consequence of defender's act, the law does not consider the connection between defender's act and the pursuer's injury severed. In the *Squib* case, a person who threw a lighted squib into a crowd, where it was thrown about by different people in self-protection, was held liable in damages to a person who was ultimately injured by it (*Scott*, *Smith's Leading Cases*, i. 438; *Clark*, 1878, L. R. 3 Q. B. D. 327; *Robertson*, 1851, 13 D. 779); and where a person, advertised to make a parachute descent in a certain

place, came down in an adjacent field, and was the means of collecting a crowd, who damaged the crop, there was held to be a relevant case for injury to crop (*Scott's Trs.*, 1889, 17 R. 32).

Where the pursuer has been injured by the act of the defender without the intervention of a third party, the result may still be so remote as not to be actionable. A trustee, who suffered from a heart complaint, was held not entitled to damages against his co-trustees, who, by their irritating and unwarrantable conduct of the trust affairs, aggravated his complaint and rendered him unfit for business (*Pridie*, 1857, 19 D. 287); and a railway passenger, who was illegally, but without unnecessary violence, removed from a carriage, failed to recover damages for the loss of a pair of race-glasses which he left behind on being removed (*Glover*, 1867, L. R. 3 Q. B. 25; *Cobb*, 1893, 1 Q. B. 459).

A somewhat different application of the doctrine of remoteness has been held to exclude recovery for personal injury from nervous shock where there has been no physical impact. Where the plaintiff was driving over a level-crossing, the gate of which had been negligently left open by the railway company's servant, and a train narrowly missed colliding with the carriage in which she was seated, and the shock she experienced brought on a severe illness, which left her with impaired memory and eyesight, it was said: "Damages arising from mere sudden terror unaccompanied by any physical injury, but occasioning a nervous or mental shock, cannot under such circumstances be considered a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper. If it were held that they could . . . in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury" (*Victorian Railway Comrs.*, 1888, L. R. 13 A. C. 222). This decision has been much criticised, however, and in a subsequent Irish case, differing from it only in the fact that there had been some physical shock, though no apparent physical injury, the Court refused to follow it (*Bell*, 1890, 26 Ir. L. R. 428: see also Pollock on *Torts*, 4th ed. p. 46: and *Wood*, 1891, 18 R. (H. L.) 27, 29).

The question of remoteness of damage is said, in England, to be for the judge to decide, and not for the jury (*Hobbs*, 1875, L. R. 10 Q. B. 122; *Hammond*, 1887, L. R. 20 Q. B. D. 89); but there seems to be no Scotch authority or dictum expressly dealing with the point. If a question of law, it ought properly to belong to the judge, who should give a direction to the jury; but the opinions expressed in the case of the parachute descent, mentioned above, and the form of issue there adjusted, seem to treat the point as a question of fact for the jury (*Scott's Trs.*, 1889, 17 R. 38).

*Interest.*—Interest, as damages, is due when there is failure to meet a pecuniary obligation, and runs from the date on which payment has been, or could have been, demanded, if payment has been "wrongfully withheld" (*Blair's Trs.*, 1884, 12 R. 110; *Carmichael*, 1870, 8 M. (H. L.) 131, *Bell, Com. i.* 690). The rate allowed is simple interest, at five per cent. (see INTEREST). A modification of this rule has been introduced, however, where the party failing to pay the principal has not had the use of it for himself, and has not been in wilful default, as in the case of a trustee who has lost the trust money through mere indiscretion. In a case where trustees had paid away the funds to the beneficiaries when it turned out that there was not a sufficient sum left to pay a creditor, and the trustees were held personally responsible, L. P. Robertson said: "As regards interest, the pursuers will, if we allow only the average rate of trust interest (3 per cent.), be put in the same position as they would have occupied if the estate had been duly

administered by the defenders. No profit has been made, or has been sought to be made, for themselves by the trustees, and we do not consider this a case where penal interest should be required" (*Heritable Securities Assoc.*, 1893, 20 R. 676; *Lynedoch*, 1832, 11 S. 60; *Douglas' Trs.*, 1867, 5 M. 827). If the failure of duty on the part of the trustees has been culpable or extreme, then legal interest will be charged against them (*Ross*, 1850, 13 D. 44; see McLaren on *Wills*, ii. 1216).

Interest on damages, where damages are due on grounds other than non-payment of money, is not, as a rule, given until the damages are liquidated by decree (*Martin & Sons*, 1872, 10 M. 949), or by application of a verdict (*Flensburg S.S.*, 1871, 9 M. 1011; *Taylor*, 1868, 40 S. J. 332; *Lenaghan*, 1858, 20 D. 848). But the rule is not inviolable, and in exceptional circumstances, at least in breach of contract, interest may be awarded as damages upon loss sustained prior to the date of action. Where defenders, an iron company, had contracted with pursuers, ship-brokers, for the carriage of a large number of sleepers at so much per ton and so many per month, and after sending certain monthly instalments had, in breach of their contract, ceased sending on sleepers, the pursuers were found entitled to interest upon each monthly payment of freight from the time when it fell due. Had there been no breach of contract, the pursuers would have had the use of the money; and therefore not only the principal sums, but interest at five per cent., being the amount of profit which pursuers presumably lost through not having the use of the money, were given as the measure of damages (*Dunn & Co.*, 1894, 21 R. 880; *Denholm*, 1865, 3 M. 815).

*Extinction of Claim.*—Besides being extinguished by explicit discharge (for which see DISCHARGE), a claim of damages may be extinguished by implication in connection with: (1) an action; (2) voluntary settlement; (3) release of one co-obligant; (4) prescription and *mora*.

(1) *Action.*—A single act, amounting either to a delict or a breach of contract, cannot be made the ground of two or more actions, for the purpose of recovering damages arising within different periods, but caused by the same act. On the contrary, the true rule of practice, based on sound principle, is that though the delict or breach of contract is of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise accuracy, at the date of the action or of the verdict, the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action. In the case in which this rule was laid down, a seller of a refrigerating machine had agreed not to sell a second within the same district for some years. Having broken his contract by selling a second, he was sued by the buyer of the first, and paid a sum in name of damages. It was held that the seller could not be sued in a second action for further damages arising out of the same breach subsequently to the first action (*Sterenson*, 1887, 15 R. 125). Where also the wrong complained of as the cause of damage, was working beyond defendant's boundary and leaving an aperture in plaintiff's coal which admitted a flow of water, and plaintiff had recovered damages for one influx, he was held not entitled to raise another action for subsequent damage caused by the aperture (which defendant was not bound to close) remaining open and admitting a continuing flow of water (*Clegg*, 1848, 12 Q. B. 576). A distinction has been taken, however, where the defendant's act has been lawful in itself and becomes actionable only through damage ensuing. In a case where defendant had worked out his own coal so as to deprive his

neighbour (the plaintiff) of support, it was held that recovery of damages for one subsidence did not bar a second action for a subsequent subsidence, since it was the subsidence and not the removal of the coal which was the cause of action (*Darley Main Colliery*, 1886, L. R. 11 A. C. 127, 133).

The rule is equally applicable in actions for injury to the person. Where a pursuer, after proof taken in an action for personal injuries, raised a second action concluding for a larger sum of damages, the second action was dismissed (*Bryan*, 1869, 6 S. L. R. 445; *Wood*, 1891, 18 R. (H. L.) 27—but after a verdict in a motion for a new trial on the ground of excessive damages, it may be competent to show that the jury have over-estimated the permanent effects of an injury, by producing evidence that the condition of the pursuer has improved in the interim (*Shields*, 1874, 2 R. 126)). If, however, two injuries of distinctly different kinds are caused by the same wrongful act, recovery for one of them does not necessarily discharge a claim on account of the other. A blow may cause injury to the person of the plaintiff and to his watch (*Darley Main Colliery*, 1886, L. R. 11 A. C. 144); or a collision in driving, to his carriage and his body (*Brunsdon*, 1884, L. R. 14 Q. B. D. 141); and he may sue first for the one injury and afterwards for the other.

Where, however, a breach of contract or delict consists not of one but of a series of acts, the rule is different. Thus if one contracts to deliver a certain quantity of goods during each month in the ensuing year, and fails to perform in the first or second month, that is in itself a distinct breach of contract; and if the purchaser sues for damages for that breach, he cannot in the same action claim for an apprehended breach in subsequent months, for the obligant may perform his contract for the future, and if he fails in any subsequent month that is a fresh breach of contract, for which a separate action will lie (*Sterenson*, 1887, 15 R. 125; *Ireland*, 1894, 21 R. 989). So also an operation *in suo* which creates a nuisance to one's neighbour, may be followed by long-continued loss and damage to that neighbour, and yet it may not be necessary to recover the whole damage in one action; because he who commits the nuisance is under a constant legal obligation to abate it, and so long as he fails in performing that legal obligation he is every day committing a fresh nuisance (*Sterenson, supra*; *Shadwell*, 1830, 4 C. & P. 333; *Thompson*, 1841, 7 M. & W. 456).

(2) *Voluntary Settlement*.—The rules governing the effect of an action in discharging claims of damages are applicable generally to agreements voluntarily come to by the parties. In particular, a discharge, unless specially restricted to particular claims, is understood to be a discharge of all claims arising out of the same subject-matter against the person in whose favour it is granted. Thus where a contract of lease was prematurely terminated by renunciation and acceptance, a claim at the instance of the landlord against the tenant for damage sustained through diminution of rent in consequence of the premature termination of the lease was dismissed because, on a construction of the acceptance, such a claim had not been reserved (*Walker's Trs.*, 1886, 13 R. 1198; *Lyons*, 1886, 13 R. 1020; *Waterson*, 9 R. 155). Similarly, a sum accepted in settlement of claims for personal injuries sustained through the fault of another is held to cover injury which may not have been known at the time, but subsequently develops. The magnitude of such subsequently developing injury is no reason for reducing the settlement, if it were honestly effected by the party discharged; and nothing short of fraud, or some of the other recognised grounds of reduction, will suffice (*Wood*, 1891, 18 R. (H. L.) 27).

(3) *Discharge of one Co-obligant*.—A general discharge of a claim arising



upon a breach of contract is a complete discharge not only of the parties to it, but of all other co-obligants who were responsible for the breach of contract. The rule is well settled, that unless such a discharge contains words of reservation, the benefit of the discharge will enure to all the co-obligants whether they are parties to the discharge or not. The rule is somewhat different in the case of actions upon delict; and where a party founds on a discharge he has not himself obtained, he must show that it is a discharge of all claims against him. Each of several wrong-doers is separately responsible for the wrong, and it is no defence to one to say that the other wrong-doers have been discharged (*Western Bank*, 1862, 24 D. 859, 901, 912, 921; *Delaney*, *infra*). A discharge will not be available to one not mentioned in it unless it appears to be a discharge of the subject-matter of the action, as distinguished from mere release of a co-obligant (*Western Bank*, *supra*, per *Ld. Cowan*, 912). Where a parent received a sum of money from the directors of an institution for children, in respect of the wrongful removal of her child, and granted a discharge bearing that it was in full of her whole claims for damages of every kind for the loss of her children, it was held to be a discharge to the superintendent of the institution also, although she was not mentioned in it (*Delaney*, 1893, 20 R. 506).

(4) *Prescription and Mora*.—The negative prescription of forty years extinguishes a claim of damages; but, apart from prescription, delay in bringing a claim may in certain circumstances bar a pursuer from insisting in it, and the plea of *mora* will, in most cases, avail a defender long before he would be entitled to plead prescription. Damages being a debt which has only a theoretical existence until a claim is made, lapse of time, accompanied by actings which suggest that a claim is not to be made, will support a plea of *mora*. Being always a question of circumstances, no general rule can be laid down as to what will constitute *mora*; but in some cases, where breach of contract is complained of, the nature of the contract itself directs attention to special points from which the intention of a party not to raise a claim, or insist on a claim, may be inferred. In continuing contracts capable of division into separate parts,—as for example, a lease for a number of years, or a contract of sale with termly deliveries and payments,—the expiry of a term is the appropriate occasion for making a claim for damage which has arisen within that term; and failure to make a claim at that time, accompanied by payment of the rent or price, raises a presumption that the claim has been departed from, or by implication discharged (*Stewart*, 1889, 16 R. 346). The further consideration that, through want of notice and lapse of time, the defender may have lost evidence which would otherwise have been available, and is unable to establish the facts necessary for his defence, will, when present, be a complete bar to the pursuer (*Lyons*, 1886, 13 R. 1025). Where a tenant farmer at the expiry of his lease brought an action of damages against his landlord for injury done to his crops during the last seven years of the lease, for all of which he had paid the rent, from alleged excess of game on the farm, but the receipt for the last year's rent alone contained a reservation of his claim, he was held not to be entitled to sue for the damage suffered in any year except the last (*Broadwood*, 1855, 17 D. 340; *Baird*, 1852, 14 D. 615; *Lamb*, 1883, 10 R. 640). The rule as to giving timely notice of the existence of the damage and of the claim is still more applicable where a proprietor claims damages from a shooting tenant on account of an excessive stock of game (*Elliot's Tr.*, 1894, 21 R. 858). Express intimation of a claim is necessary, and mere grumbling or protest on the part of a tenant who pays his rent, is not sufficient to keep the claim open. Especially is this the case where the damage is from such causes as game or failure to burn heather,

when the evidence is apt to be speedily lost (*Broadwood, supra; Emslie, 1894, 21 R. 710*). But where the breach of contract complained of leaves permanent traces, as in the case of failure to maintain buildings, the last-mentioned consideration does not apply; and if specific notice, although oral, is given to the landlord to put them in repair, and rent is paid on the ground that that will be done, the payment of rent will not bar pursuer's claim (*Johnstone, 1894, 21 R. 777*). Nor will payment of rent bar a claim which has been specifically made in writing although the landlord has in ensuing correspondence denied liability, unless there has been a formal withdrawal of the claim (*Macdonald, 1883, 10 R. 959*). But where, after a controversy has been raised, a renunciation of lease has been carried through without a reservation of the tenant's claims, he will be held to have departed from them. A renunciation being in the nature of a compromise, the landlord, who makes the concession of discharging the tenant from all further liability under the lease, is not presumed to have done this without getting some consideration in the shape of a discharge of such claims (*Lyons, 1886, 13 R. 1020; Waterson, 1881, 9 R. 155*).

The rule that expiry of a contract, with performance of the prestations on either side, bars an unreserved claim of damages, is also exemplified in the case of master and servant. A servant is not entitled to remain in service for the full period of service and take payment of wages, and at its expiry to bring up claims of damages (*Fraser, 1878, 5 R. 598*). A railway servant who received injuries in the course of his employment, and remained in the service of the company for twenty-five years, accepting such work as they gave him, was found not entitled to raise an action for his injuries on leaving their employment (*Cook, 1872, 9 S. L. R. 315*); and an action for damages for seduction brought by a woman, who at the time of the seduction, and for a long period thereafter, had been in the position of servant, against the representatives of the deceased master, was held to be barred by delay and remaining in the service (*Maloy, 1885, 22 S. L. R. 790*). Remaining in the service even for a few days may afford evidence of condonation, if the cause of complaint is one that would justify leaving the service, as being charged with theft (*A. v. B., 1853, 16 D. 269*). But youth, isolation from friends, and other circumstances may explain continuance in the service so as to elide the plea of *mora* or condonation (per L. P. Inglis in *Fraser, supra*; see also *McNeill, 1883, 10 R. 867*). In the case of breach of promise of marriage also, where intimation of a claim should be made about the date of the breach, the circumstances may explain considerable delay in raising an action. A delay of eight years in taking legal proceedings after courting had ceased, was held not to be a bar where the pursuer had given timely and repeated warning that she was to insist in her claim (*Colvin, 1890, 18 R. 115*).

Where there is no contract between the parties, and consequently no point of time at which it is more appropriate to make a claim for damages, evidence in support of the plea of *mora* is to be sought mainly in the length of time that has elapsed before the claim is made. A period of nearly twenty years which had elapsed since the erection of an embankment, alleged to be illegal, and to be the cause of throwing flood-water on the lands of a neighbouring proprietor, was considered to be an element of importance in dismissing a claim for occasional damage during those years (*Murdoch, 1881, 8 R. 855*); and a longer period which elapsed between damaging operations in the construction of railway works and the raising of an action by a damaged proprietor, was held to be conclusive against the pursuer (*North British Ryw., 1879, 16 S. L. R. 265; Barclay, 1882, 10 R. 144*).

## II. RULES IN BREACH OF CONTRACT.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be (1) such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself; or (2) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract" (*Hadley*, 1854, 9 Ex. 341, 354). In other words, the first alternative defines general, and the second special damage (Ersk. *Prin.* 19th ed., 435; Mayne, p. 12 *et seq.*).

(1) *GENERAL DAMAGE*.—*Sale*.—The most common illustration of damage arising naturally, or in the usual course of things, is in sale of goods, where the buyer has failed to accept or the seller has failed to deliver. In these cases the damage (now regulated by the Sale of Goods Act, 1893, ss. 50 and 51) is *prima facie* the difference between the contract and the market price of the goods, when there is an available market for the goods, at the date of the failure to deliver or accept, or if no date has been fixed, then at the date of the refusal to deliver or accept. A vendor is not bound to sell goods, acceptance of which is refused, but if, instead of going into the market and selling at once, he keeps the goods after the date of the breach, and sells at a price less than the market price then was, he is not entitled to charge the buyer under the contract sued on with the additional loss caused by a further fall in the market (*Warin*, 1876, 4 R. 190 (H. L.) 75), and a similar principle applies to the buyer. He is supposed at once to replace the goods at the current price of the day, so as to minimise the loss to the seller (*Duff*, 1891, 19 R. 199). According to the old common law, when the vendor was in breach of the contract, the buyer was entitled to have the profit he would have earned on a resale considered (*Dunlop*, 1848, 6 Bell's App. 195), but probably the words "*prima facie*" in the Sale of Goods Act (*which see*) exclude this additional item of general damage. In any event, nothing more than ordinary commercial profit will be allowed as general damage, although it could be clearly proved that, in the circumstances of the case, larger profits might have been made, because ordinary commercial profit represents the loss which the seller contemplates as the result of his breach of contract (*Duff*, 1891, 19 R. 199).

*Carriage*.—In contracts for carriage of goods, besides claims for the value of goods lost or injured while in the hands of the carrier (for which, see CARRIER), claims also arise on account of delay in delivery. Loss of market may be a result arising naturally and directly from this breach, and consequently an item of damage. If there is a special contract to forward preferably to other traffic, or such contract is implied from the perishable nature of the goods, or if, without any time being fixed for delivery, there

is great delay, the carrier will be liable for such a consequence of late delivery (see *Finlay*, 1870, 8 M. 959, 970). Where pigs were sent to a carrier for delivery at a town where they were to be sold at a weekly market, and they arrived late and were sold at a loss (*Anderson*, 1875, 2 R. 443); where bales of cloth were handed to a railway company to be forwarded to Germany, and were injured on the way by the company, and had to be returned to the sender to be repacked, whereby they were delayed and lost the market in Germany (*Keddie*, 1886, 14 R. 233); where confectionery and the like perishable goods, intended to be supplied to a festivity, were not forwarded preferably, and were rejected in consequence of late arrival (*Macdonald & Co.*, 1873, 11 M. 614); and where owners of a ship committed a breach of charter party by leaving part of cargo of barley at the port of shipment, and charterers had to get it carried by a later ship, so that it arrived when price of barley had fallen (*Dishington*, 1871, 8 S. L. R. 665)—damages for loss of market were recovered.

When, on the other hand, a carrier fails or refuses to receive goods sent to him, and the sender has to forward them in a more expensive way, he is entitled to recover from the carrier the extra freight (*Dishington, supra*), and the *onus* is on the defender to prove that the mode of conveyance taken was more expensive than was necessary, if he takes that plea (*Connal*, 1883, 10 R. 824).

*Date of Failure to Deliver.*—When, in a contract of sale, continuous deliveries extending over a tract of time are provided for, the damages, where the contract is divisible into distinct periods, may require to be calculated as at different dates during its term instead of at its expiry (*Roper*, 1873, L. R. 8 C. P. 167). Where a coal company contracted to supply a coal merchant with 3000 tons of coals, to be delivered over four months in about equal monthly quantities, and at the end of the period had delivered only about 1500 tons, it was held that deliveries should have been at about 750 tons per month, and that the merchant had no right to call on the company to make up in succeeding months for quantities short-delivered in earlier months, but that it was the duty of the merchant to buy in at the end of each month for the quantity short-delivered during that month; and therefore that the amount of damages was to be calculated on the basis of the market price ruling at the end of each month for the quantity short-delivered during that month (*Ireland*, 1894, 21 R. 989). Though delivery by monthly quantities is not specified, the contract may be held to be separable into monthly parts, and the rule of the above case applied (*Bergheim*, 1875, L. R. 10 Q. B. 319; *Roper*, 1873, L. R. 8 C. P. 167).

When a definite time is fixed for delivery, and before that time arrives intimation is given that the contract will not be fulfilled, it is the date of delivery and not the date of the repudiation that is taken (*Phillpotts*, 1839, 5 M. & W. 476). When no time is fixed the date of the refusal to deliver is taken (Sale of Goods Act, 1893, sec. 51. 3).

*No Available Market.*—When there is no available market in which the kind of goods in question can be dealt with, the rule is that the whole loss—that is, ordinary commercial loss, or, in the case of a purchaser, the profit which the purchaser would have made if he had received the article and resold it in the ordinary course of trade—is to be borne by the party in breach of contract (*Watt*, 1839, 1 D. 1157). Where iron huts, delivered in South Africa, were found to be disconform to contract and were rejected by the buyer, damages were allowed for estimated loss of profits on a resale, and for expenditure in advertising, and travelling expenses which were incurred in view of the contract being fulfilled, and rendered unremunerative by the

breach (*Duff*, 1891, 19 R. 205). Similarly, where there was delay in delivering goods for shipment, and the purchaser had to pay additional freight and insurance in consequence, these charges were recovered. The extra freight and insurance payable represented the difference in value of the goods when delivered, and when contracted to be delivered (*Borries*, 1865, 18 C. B. (N. S.) 445; *Hind*, 1875, L. R. 10 Q. B. 265).

*Subject Purchased for Use.*—When a subject is purchased not for resale but for use, damages will be estimated in view of the use for which it was intended. This will include the loss which followed from its not being supplied, or from its turning out to be defective, or, in the case of land, from being burdened with an easement, and the profit which would have been made of it, if it had been delivered according to contract (*Mayne*, p. 183). Thus where a ship was deficient in carrying capacity, the standard of damages was said to be the difference between the earning powers of the ship contracted for and the ship furnished (*Gillespie*, 1885, 12 R. 800); and again, where a ship, intended for carrying passengers in the Australian trade, had not been timeously delivered, and freights had fallen, the difference between what she actually earned on her first voyage, and would have earned if delivered at the contract time, was taken (*Fletcher*, 1855, 17 C. B. 21; *Collard*, 1892, 19 R. 987, 20 R. (H. L.) 47). But speculative profits will not be allowed. Where the subject of sale was land, which turned out to be subject to restrictions against building, it was said that more should not be given in respect of the prevention of full enjoyment of the land, than its fair value at the time of sale (*Louttit's Trs.*, 1892, 19 R. 800). The loss to the purchaser is always the test, but the way of estimating it varies with the circumstances. In the case of cabbage seed of a wrong kind being supplied, from which useless plants were raised, the unprofitable occupation of the pursuer's land and wasted labour instructed the amount (*Wilson*, 1894, 21 R. 732); and where injury to the plaintiff's horses was caused by the breaking of a defective carriage-pole, the depreciation in the value of the horses was the damage (*Randall*, 1877, L. R. 2 Q. B. D. 102).

*Actio quanti minoris.*—There are only two remedies open to a purchaser for non-fulfilment of a contract of sale of personal or heritable property. He has in the first place a right to rescind the contract, conditional on his rejecting the goods or heritable property, and to claim damages proportioned to the inconvenience to which he has been put by the non-fulfilment of the contract. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of a latent infirmity either in the title or the quality of the subjects sold, discovered when matters are no longer entire. At one time it was doubted whether this form of action was competent in the case of sales of moveable property, but it was never doubted that under the clause of warrandice such a right did belong to the purchaser of heritable estate, who discovered that some part of the subject of sale had not been conveyed to him. Now, however, it is quite settled that in such cases as sales of ships (*Spencer*, 1879, 7 R. 396), and fixed machinery (*Fleming & Co.*, 1882, 9 R. 473; *Pearee*, 1869, 7 M. 571), which cannot be returned after they have been in use, if it is discovered after use that the extent or quality of the subjects sold is disconform to contract, the purchaser's remedy takes the shape of an *actio quanti minoris*. Under this action the pursuer may recover such sum as will enable him to put the subject in proper repair, or compensate him for loss of profit, where the subject is of less value than he originally bargained for. There seems to be no reason why the remedies in the cases of personal and heritable property should not be of the same kind. When a purchaser of lands or houses finds some defect in his title, or in the

subjects conveyed to him, if matters are entire it is his duty to reject the subject of sale, and to claim damages. But if, after buildings have been erected, or the ground sold, or outlay has been incurred, the purchaser discovers that there is a servitude affecting the property, or part of the property is carried away from him, that is a proper case for making effectual the protection secured to him under the clause of warrandice,—that is to say, his remedy is the *actio quanti minoris* (per Ld. McLaren, *Louttit's Trs.*, 1892, 19 R. 799–800. As to option of rescission or damages in sale induced by fraud, see Glegg on *Reparation*, p. 212). Now, however, by the Sale of Goods Act, 1893, s. 53, where there is a breach of warranty by the seller of a corporeal moveable, the buyer may retain the goods and (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty.

*Service.*—The claim of a servant wrongfully dismissed from his employment is not for the amount of the wages he would have received had he remained in the employment till the expiry of the contract period, for that would place him in a better position than if the breach of contract had not occurred, but for damages (*Cameron*, 1872, 10 M. 301; but see *Stewart*, 1871, 9 S. L. R. 23). The amount of damages is calculated in view of the loss to the pursuer: and consequently there are taken into consideration, on the one hand, the privileges and perquisites of the servant's position as well as the amount of wages (*Bentineck*, 1869, 6 S. L. R. 376), and, on the other, the wages the servant earns or might earn in other employment (*Ross*, 1894, 21 R. 402). If the contract of service is brought to end not by breach, but by dissolution, as in the case of death, the claim is not one of damages, but of compensation. In one such case the sum found due to a servant was his salary to the end of the term, under deduction of his earnings in another employment during the unexpired period (*Hoey*, 1867, 5 M. 814); in another, where a coalmaster discontinued working a pit, his manager was awarded three months' wages in place of three months' notice (*Forsyth*, 1880, 7 R. 887; see *Ross*, *supra*). Damages may also be recovered where there has not been dismissal from the service, but merely failure to implement part of the contract, as failure to teach an apprentice part of his trade (*Lyle*, 1863, 2 M. 115), or to supply a domestic servant with proper board (*Fraser*, 1878, 5 R. 596). In no case can a servant's claim for mere dismissal exceed the amount of remuneration fixed by the contract; for a master is always entitled to dismiss a servant during the service, on paying the wages earned and the value of the situation up to the end of the engagement (*Mollison*, 1885, 22 S. L. R. 595).

The claim of a master against his servant for deserting his employment is not calculable with reference to wages, and must always be matter of proof. A claim has been allowed for (1) loss of time, (2) inconvenience, (3) loss of business (*Cameron*, 1867, 3 S. L. R. 282). A servant deserting his employment does not forfeit his right to wages already earned, but they are subject to deduction of the amount of damage caused by his breach of contract (*Gibson*, 1861, 23 D. 358).

*Expenditure incurred by Pursuer on Faith of Contract.*—Another illustration of loss naturally arising, occurring in different kinds of contracts, is where expenditure has been incurred by one party, after a contract has been entered into, in expectation of its performance, which is rendered worthless by non-fulfilment by the other party when the day for performance arrives. The leading example of this class of cases is the claim for patrimonial loss, in actions of breach of promise of marriage, in respect of clothes and plenishing purchased in view of matrimony. Damages have also been

allowed for anticipatory expenditure where pursuer prepared his house to receive defenders as boarders (*Dobie*, 1873, 11 M. 749); and where an emigration society had employed a secretary and made various disbursements for shipping emigrants on a ship which the owners, in breach of charter party, failed to supply (*Scottish Australian Society*, 1855, 18 D. 239; see also *Duff*, 1891, 19 R. 205). A claim of this sort may be sustained even where the expenditure has been made on the faith of a contract being completed, although at the time it has not become binding, and never does, and where, consequently, specific implement could not be given (*Walker*, 1823, 2 S. 338, or 379; *Dobie*, *supra*, 755).

(2) *SPECIAL DAMAGE*.—*When not Recoverable*.—Special damage, that is damage arising from circumstances peculiar to a particular case, is not recoverable unless those circumstances are known to the person who has broken the contract (*Hammond*, 1887, L. R. 20 Q. B. D. 79, 88). Where plaintiffs, owners of a steam mill, gave a broken shaft to defendant, a carrier, to be forwarded immediately to an engineer, who was to make a new one, and defendant delayed to forward it, plaintiffs were not allowed to recover the loss of profits due to the mill being kept idle. If, however, defendant had known that the want of the shaft would keep the whole mill idle, and that a loss of profits would be the consequence of his breach of contract, then he would have been responsible for the whole loss (*Hadley*, 1854, 9 Ex. 341; *Ger*, 1860, 6 H. & N. 211; *British, etc., Co.*, 1868, L. R. 3 C. P. 499; *Webster*, 1875, 2 R. 752, 755). Ignorance of a subcontract under which pursuer would earn special profit, is also a case which has been decided in England to fall within the rule, and probably the same would be held in Scotland (*Duff*, 1891, 19 R. 199; but see *Dunlop*, 1848, 6 Bell's App. 195, 211). Where plaintiffs had undertaken to supply shoes for the use of the army by a particular day, and handed them to defendant for carriage, stating simply that they were under contract to deliver by that day, and defendant delayed delivery, in consequence of which the shoes were not accepted, the plaintiffs were held not entitled to recover the difference between the ordinary market value of the shoes and the specially high value under the army contract, as they had not been informed on that particular (*Horne*, 1873, L. R. 8 C. P. 131; *Hales*, 1863, 4 B. & S. 66). Where, also, a message in cypher had been handed to defendant for delivery and was delayed through his inattention, defendant, not knowing the nature of its contents, was not liable for the loss on a transaction to which the message related (*Sanders*, 1876, L. R. 1 C. P. D. 326; see *Mayne*, 5th ed., p. 29).

*When Recoverable*.—On the other hand, if the party in breach of contract knew of the special circumstances, he will be liable if the loss for which damages is claimed is the natural result of his breach of contract in these circumstances. On this ground, where a person supplying iron stills knew that they were to be used at pursuers' works in distillation of oil at a very high temperature, and the stills developed flaws after being in use, and, becoming useless, threw part of the works idle, he was found liable for the loss thereby sustained (*Fleming & Co.*, 1882, 9 R. 473). Where, also, defendant was employed by plaintiff to make part of a machine to enable plaintiff to deliver the whole article under a contract of which defendant was informed, and defendant failed timeously to supply his part, and in consequence the buyer refused to take delivery, the plaintiff was found entitled to the cost of making the machine, and also to the loss of profit he would have derived from his contract with the buyer (*Hydraulic Engineering Co.*, 1878, L. R. 4 Q. B. D. 670; *Elbinger Actien-Gesellschaft*, 1874, L. R. 9 Q. B. 473). Special damages were also recovered where pursuer, who had

chartered a tug for salvage purposes, lost a salvage contract and large profits through the late arrival of the tug (*Mackenzie*, 1883, 10 R. 705).

*Relief*.—Where the party complaining of the breach has previously been sued, and has had to pay for his breach of contract under a subcontract of which the defaulter in the original contract had notice, not only the profits he has lost under the subcontract, but also the damages he has had to pay in that action, may be recovered from the original defaulter (*Grébert Borgnis*, 1885, L. R. 15 Q. B. D. 85; *Jones*, 1867, 15 L. T., N. S. 619). The costs of the defence may also be recovered, if the defence has been reasonable (*Mors le Blanch*, 1873, L. R. 8 C. P. 227; but see *Fisher*, 1876, L. R. 1 C. P. D. 505), as where a vendor from whom relief is claimed has, on intimation of the action, taken up the position that the article in dispute is of the description under which it was bought and resold (*Hammond*, 1887, L. R. 20 Q. B. D. 79).

*Specific Implement or Damages*.—As a rule, it is in the option of a party complaining of breach of contract to sue for specific implement or damages, and the rules that obtain in England as to specific performance do not apply here. If pursuer elect to sue for specific implement, he cannot be compelled to resort to the alternative of an action of damages, unless implement is shown to be impossible, in which case *loco facti subit damnum interesse* (*Coker*, 1893, 20 R. 954; *Gillespie & Co.*, 1885, 12 R. 800), or the Court, on equitable grounds, refuse the first-mentioned remedy (*Stewart*, 1890, 17 R. (H. L.) 1, 10). Even when the contract itself provides an alternative remedy, as that a landlord may put premises into a state of repair under arbitration, and charge the expense against his tenant, he may elect to forego the alternative remedy, if it is not specified as the only remedy, and claim damages instead (*Allan's Tr.*, 1891, 19 R. 215). It was said, in a case where the remedies were concluded for alternatively, that it was in the discretion of the Court to grant decree for either specific implement or damages, where the circumstances indicated either as the more appropriate (*Moore*, 1881, 9 R. 337; *Winans*, 1883, 10 R. 941). It is of course clear that the Court will not order specific implement, though it is only payment of money, when the counterpart cannot be performed by pursuer. Thus an action by a servant for wrongful dismissal must be for damages, and not for the amount of wages he would have earned (*Cameron*, 1872, 10 M. 301; *Bentinck*, 1869, 6 S. L. R. 376).

*Mitigation or Reduction of Damages*.—It is the duty of a person complaining of a breach of contract, to take reasonable means to lessen his loss, and any loss which ordinary care on his part would have avoided cannot be recovered from the party in breach (*Duff*, 1891, 19 R. 199). This principle has been given effect to in holding that it is a mitigation of damage to show that pursuer, a dismissed servant, had been offered other employment (*Ross*, 1894, 21 R. 396; *Hoey*, 1867, 5 M. 814); that pursuer, complaining of delay in delivery of goods, had failed to give notice to defender, a carrier, of the undue detention (*Dobson*, 1861, 33 Sc. Jur. 443); that pursuer had obtained a profit under a new contract into which he entered after the breach complained of (*Mackenzie*, 1883, 10 R. 705; *Collard*, 1892, 19 R. 987); or had refused an advantageous offer, as in case of shipowner refusing offer of cargo at another port, when there had been failure to supply cargo at the contract port (*Wilson*, 1857, 26 L. J. Ex. 242); or that pursuer's negligence in not observing that wrong goods had been supplied, contributed to the loss (*Wilson*, 1894, 21 R. 732).

*Penal and Liquidate*.—Sometimes a contract itself appears to settle by anticipation the question of the amount of damages, by stating a sum which



shall be payable in the event of a breach. Such a stipulation however does not mean that payment of the penalty dispenses with performance, and the party seeking to enforce the contract is not prevented from suing for implement by the other tendering payment of the penalty (*Gold*, 1870, 8 M. 1006). But he is not entitled to the penalty and also damages (*Hyndman's Tr.*, 1895, 33 S. L. R. 359). If the stipulated sum is regarded as liquidate damages, then that sum is said to be the measure of damage; but if it is regarded as penal, then it will not be enforced according to its terms, but an inquiry will be allowed as to the actual loss which the pursuer has suffered, and the damages modified accordingly (*Commercial Bank*, 1890, 18 R. 80; *Robertson*, 1881, 8 R. 555). But if the amount of damage proved is greater than the sum mentioned in the penalty clause, the latter restricts the amount recoverable to the sum named (*Johnstone's Trs.*, 19 Jan. 1819, F. C.; *Hyndman, supra*); and on the other hand, if a sum agreed on as liquidated damages is exorbitant, the Court will allow a modification (*Forrest*, 1869, 8 M. 187). Whether a sum named in a contract as damages is penal or liquidate is often a difficult question of construction, in which the use of the terms themselves may not be conclusive. See PENAL and LIQUIDATE.

*Damages as a Counter Claim.*—The general rule, that an illiquid claim cannot be pleaded as a set off against a liquid, does not in all cases prevent a defender from founding on a claim of damages in answer to a demand for a definite sum due under a contract (*Ross*, 1895, 22 R. 461). In the first place, where damages for breach of contract are liquidated by the terms of the contract, the case is clearly outwith the rule. Accordingly, a claim of damages sustained by reason of delay on the part of contractors in executing certain work, liquidated by the agreement at £5 per week after a specified date, was held to be a good answer to a demand for the price of the work executed (*Johnston*, 1861, 23 D. 646). In the second place, the principle applies that one party is not entitled to enforce performance of a contract if he has himself violated an express condition thereof (*Lorie*, 1895, 23 R. 1). On this ratio a defender, in circumstances similar to those in *Johnston's* case, with the difference that there was no penalty clause in the contract, was held entitled to have the amount of his damage ascertained in the action *ope exceptionis* (*Macbride*, 1875, 2 R. 775, 784). But it was considered essential that there was an express provision in the contract as to the time allowed for its execution: and if the only complaint of the defender had been that the work had not been completed in reasonable time,—an implied condition in all contracts,—that would not have led to the same result (*id.* p. 781). If, however, the stipulations founded on on both sides are implied, non-performance on the one side is a good answer to a claim for performance on the other (*Gibson*, 1876, 3 R. 328). The applicability of the plea that non-performance by the one party entitles the other to withhold performance of his obligation, depends on the question whether the two obligations are conditional with respect to one another (*Sirright*, 1890, 17 R. 917, 920). This condition has been held to be fulfilled where a tradesman by unskilful copping of a vessel's bottom had caused damage greater than the price sued for (*Hunter*, 1858, 20 D. 1353; *Scottish North-Eastern Ry.*, 1859, 21 D. 705): where a person, suing for rent, had failed to put the buildings into tenantable repair (*Sirright*); had broken a condition of the lease, that he should not let an adjoining shop to a person in the same trade, whereby defender's business had suffered to an amount greater than the rent claimed (*Davie*, 1876, 3 R. 1114); had by his neglect allowed grain stored in his warehouse to get injured (*Gibson*, 1876, 3 R. 328). The plea of compensa-

tion would probably be also allowed against a law agent suing for an account in connection with business he had conducted negligently, to the damage of his client (*Burt*, 1861, 24 D. 13; *Dixon*, 1863, 36 S. J. 30).

It is to be observed, however, that the plea of non-performance is sometimes rather a plea of not due, than of compensation,—as, for instance, where a claim for rent is met with the answer that possession of part of the subjects let has not been given (*Muir*, 1887, 14 R. 470). This is so in the case of an article supplied under an executorial contract, so that it cannot or need not be returned, alleged to be disconform to contract, where the remedy consists in the right not to pay more than its true value, and the buyer is entitled to deduct the sum which represents the difference between the value of the article contracted for and that actually furnished (*Dick*, 1888, 16 R. 242; *Muldoon*, 1882, 9 R. 915; *Hunter*, 1858, 20 D. 1353).

The condition attaching to the pleading of damages as a counter claim, that the counter claim must arise out of the same contract as the claim sued on, is strictly enforced. Where a carrier sued for freight of certain goods, defender was not allowed to prove damage suffered by delay in delivering another parcel of goods under another contract (*Scottish N.-E. Rwy.*, 1859, 21 D. 700): and where an outgoing tenant sued his landlord for the price of the waygoing crop, which had been ascertained in a submission as provided for in the lease, the defender was not allowed to set off against the price an illiquid counter claim under the lease for damages for miscropping and for failing to upkeep buildings. The tenant's action was said not to be founded on the contract of lease, but on a separate and distinct contract, which had no necessary connection with the lease. The landlord had bought and received the crop at a fixed price, and having got the full consideration for the money he was asked to pay, it was no defence to prove a claim of damages arising out of another matter (*Sutherland*, 1895, 23 R. 284).

### III. RULES IN DELICT.

While, as has been shown, there are, in cases of contract, rules capable of definite statement, and generally applicable, the rules in delict are much less definite, and differ in different classes of delict. A further uncertainty arises from the fact that the award is made by a jury, for the award of a jury will not be interfered with by the Court unless the sum is altogether so extravagant that no other jury would repeat it. Unless the Court is of opinion "that the verdict ought not to have been for more than one-half of the sum awarded, there is not, according to our practice, any room for interference" (*Young*, 1882, 10 R. 242). But a jury is bound by certain rules as to what may and may not be included as elements of damage, and disregard of these will invalidate their finding (*Young, supra*, 243; *McLaurin*, 1892, 19 R. 346).

A broad distinction may be drawn between cases of injury arising from negligence or mistake, and those arising from acts prompted by malice or wrongful motive. In the former class, damages will be restricted to what is considered to be compensation for the loss caused; in the latter, the injury is held to be exaggerated from the manner in which it has been brought about, and a larger award of damages is allowed, although the actual loss may be the same. For instance, a person who got his leg broken would recover much more if it had been caused by the defender assaulting him than he would if it had been caused by a bale falling from defender's cart through the negligence of the driver. Similarly, only the intrinsic value of an article is recoverable where the

damage has been caused without fraud or malice, and not the *pretium affectionis* (Ersk. iii. 1. s. 14).

**ACTION FOUNDED ON NEGLIGENCE.**—Where the amount of the loss is capable of exact or approximate ascertainment, as in the case of injury to property, the extent of which can be estimated by reference to depreciation in selling value, no difficulty arises, and damages are awarded on the footing that the pursuer is compensated for his loss. But where such a test is inapplicable, as in the case of injury to the person, the award cannot be said to be compensation in the sense of putting the pursuer in as good a position as he was prior to the accident.

**Injury to the Person.**—No money award can be an equivalent for the loss of a limb or eyesight or brain-power, and the law does not assume that pursuer would have chosen to suffer the injury for any money payment (*Rowley*, 1873, L. R. 8 Ex. 221, 231). It allows three elements to be taken into consideration in fixing an award in cases of this kind. In the first place, it must be given for the expenses to which the pursuer has been put, on account of the accident, for medical attendance and lodging: in the second place, for the physical suffering which has been thereby occasioned, whether temporary or permanent; and in the third place, for the loss of business which has resulted, so far as that can be proved (*Young*, 1882, 10 R. 242, 243).

**Resulting Injury to Business.**—The amount awarded for loss of business or professional income will be the fairest estimate that can be made, in view of the uncertainties of life and business affairs, of the probable continuance of the pursuer's income. Contingencies, such as accident or bankruptcy, are not to be disregarded. Therefore the damages are not to be calculated as the value of an annuity for the rest of his life, of the same amount as the pursuer's average income (*McKeechie*, 1858, 20 D. 551; *Phillipps*, 1879, L. R. 5 Q. B. D. 78). If a pursuer makes a specific claim for injury to business, he must submit his business books to inspection on behalf of defender (*Johnston*, 1892, 20 R. 222; *Craig*, 1888, 15 R. 808), just as he must allow himself to be medically examined as to the extent of his physical injuries (*Junner*, 1877, 4 R. 686). But a claim for damage to business capacity may be entertained although no specific loss to business is alleged or proved (*McLaurin*, 1892, 19 R. 346).

**Loss of Relative.**—When a person sues for damages for loss of a relative, in those cases where such a claim is competent (see TITLE TO SUE), a sum for *solatium* for wounded feelings is allowed in addition to that for loss of support. The reported cases afford no guide as to what amount will be allowed for *solatium*, but the practice has been to allow a hundred or two (see *Horn*, 1878, 5 R. 1055, 1075; *Wallace*, 1888, 15 R. 307). The amount allowed for loss of pecuniary support or assistance is also left indefinite. In one case, where £550 was allowed on account of the death of a son in partnership with the pursuer in a business supposed to be worth £700, of which £100 might be supposed to be the worth of the son's services to pursuer, the sum allowed was considered not excessive (*Horn*, *supra*). In another case, the sum of £900 awarded to pursuer for the death of her husband, who was earning only £150 per annum, was reduced by the Court to £500 (*Wallace*, *supra*).

**Aggravation of Damages.**—While vindictive damages are not allowed in actions laid on negligence, the jury may in certain cases competently consider the conduct of the defender as well as the actual loss to the pursuer. In these cases it is relevant to show, with the view of increasing the damages, the degree of fault of which defender has been guilty. In

actions, for instance, against railway companies for injuries caused by the negligence of their servants, it has been held that defenders were not entitled to have the question of fault removed from the consideration of the jury by giving an admission of liability (*Cooley*, 1845, 8 D. 288; *Dobie*, 1856, 18 D. 862). In breach of promise of marriage also, where, though the action is brought on contract, the damages are found on fault, the conduct of the defender is a relevant part of the inquiry.

*Violent Profits*.—In the computation of damages in respect of possession of land without a title, inquiry is also allowed as to the conduct of the defender. If possession has been in *malâ fide*, as in the case of a tenant who fails or refuses to leave after due warning, or of a person possessing throughout without a title, violent profits will be awarded (*Tod*, 1889, 17. R. 226. As to caution in a removing, see Act 1555 c. 39). Whether a tenant has possessed in *malâ fide* or in *bonâ fide* is always a question of circumstances. "When possession has commenced in good faith, it lies with the true owner to show when it ceased to be so, before the right to demand violent profits can prevail. Secondly, where possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides*, that he had *probabilis causa litigandi*; and third, the principle is equally applicable whether the possession be challenged in respect of title in the possessor's author, or in respect of the nature and conditions of his own right" (*Houldsworth*, 1876, 3 R. 304, 310). The measure of the damage in rural subjects is all that the pursuer could have made of the subject if he had been in possession, and all the damage done to the subject by the defender (*Gardner*, 1877, 4 R. 1091). In urban subjects, violent profits have been estimated at double the rent (*Watt*, 1822, 1 S. 509, or 556). The claim for the excess rent prescribes in three years (*Ersk. Prin.*, 19th ed., 185).

*Wrongful Abstraction of Minerals*.—In the analogous cases of abstraction of minerals by an adjoining mineral tenant, the rule now acted on is to find the defender liable merely in the actual loss to the pursuer where the defender has acted innocently, and to deal with him according to the rule laid down in *Gardner's* case where he has acted in bad faith, or culpably (*Peruvian Guano Co.*, 1892, A. C. 166, 167–178). Thus where a coal-mining company worked out coal under an adjoining proprietor's land in the belief, which the proprietor shared, that the coal belonged to them, and it appeared that the proprietor could not himself have worked the coal to a profit, on account of its small extent, the company were found liable only in a lordship on the coal excavated, calculated at the rate paid by them to the superior for the surrounding coalfield (*Livingstone*, 1880, 7 R. (H. L.) 1). On the other hand, where a railway company excavated freestone under the lands occupied by them in obvious disregard of their title, by which minerals were reserved to the superior, they were found liable in the market value of the stone removed by them, less the cost of working, although it appeared that the superior could not have worked it himself (*Davidson's Trs.*, 1895, 23 R. 45).

*Mitigation of Damages*.—In mitigation or reduction of damage, it may be shown that pursuer, by reasonable care, could have diminished the loss suffered. But facts which, if pleaded, would be a bar to the action, are not admissible for the purpose of reducing damages (*Mayne on Damages*, p. 452). Thus where the want of care on the pursuer's part amounts to contributory negligence, that must operate as a complete answer to pursuer's claim, and cannot be made a ground for deducting a

sum from the damages he would otherwise have got (*Florence*, 1890, 18 R. 247). Where the apparent damage is greater than the real, on account of some circumstances special to the individual case, these may be pleaded, as, for instance, in breach of promise, that the defender was an undesirable husband (*Irving*, 1824, 1 C. & P. 350). But it is not allowable to plead, in cases of personal injury, that because pursuer has private means he is less entitled to damages (*Phillips*, 1879, L. R. 5 Q. B. D. 78); or that the loss is covered by insurance (*Simpson & Co.*, 1877, 5 R. (H. L.) 40. See SUBROGATION. That would be to make the injured person pay for the defenders' wrong-doing out of his own pocket (*Brudburn*, 1874, L. R. 10 Ex. 1).

*Statutory Limitations.*—Statutory limitations of liability are introduced by various Acts, general and local, which are too numerous to discuss here, but which will be found under their respective headings. The statutory provision may restrict the amount recoverable, as in the Employers' Liability Act, 1880, the Summary Procedure Act, 1864, and the Two-penny Acts; or it may restrict the time during which an action may be brought, as in the same Acts; or may declare that no action will lie for mere negligence in executing the Act, as in the Public Health Act of 1867, and various local Police Acts.

*Infringement of Patent.*—Infringement of patent renders the party infringing liable either in the profits he has made or in damages, but not in both (*Neilson*, 1871, L. R. 5 H. L. 1). If profits are taken, then there must be an accounting; if the pursuer elects to take damages, then they will be calculated on the footing that his damage is the profit he would have made in selling the quantity of goods sold by the infringer, subject to deduction on account of anything showing that pursuer would not have effected so large sales as the infringer (*United Horse Shoe Co.*, 1888, 15 R. H. L. 45). Where the pursuer grants licences to use his patent, the damage will be the amount of royalty which ought to have been paid on each article manufactured. If the user of the article pays the royalty, the manufacturer is not further liable (*Penn*, 1867, L. R. 5 Eq. 81).

*Trade Mark.*—Every sale without licence of a patented article must be a damage to the patentee, but the case of sale of an article under a trade mark is different, because, in the latter, the article sold is open to the whole world to manufacture, and the objection of the pursuer is to goods being sold under his mark. Consequently, the pursuer cannot claim damages for every article sold by defender under this mark, but must show that his trade has suffered (*Davenport*, 1865, L. R. 1 Eq. 302, 308).

*ACTION FOUNDED ON MALICE.*—Where an action is founded on malice, either express or implied, damages are understood to be punitive as well as reparatory in their nature, and more than mere nominal damage may be recovered although no actual loss is shown. Thus a verdict for £50 for calling a man a thief was considered not excessive, although there was no attempt to prove real damage (*Fletcher*, 1885, 12 R. 683). But though substantial damages will be allowed for serious slander, or insulting assault, large damages will not be allowed where no special damage is shown: and in cases of imputations on business men, where injury to business has not been proved, the Court has offered the pursuer the alternative of a reduced award or a new trial (*Ritchie*, 1883, 10 R. 813; *Johnstone*, 1875, 2 R. 836).

*Aggravation.*—As malice, though present only in the legal sense, may render an act wrongful, it naturally follows that the greater the malice the more wrongful the act, and that special malice or personal ill-will may be proved in aggravation of damages (Mayne, p. 45). With this object it

is competent to prove that a libel was written in pursuance of a scheme to destroy the pursuer's reputation, or done deliberately to gratify an *animus* on the part of the defender (*Cunningham*, 1889, 16 R. 383); and that defender went about repeating the accusation complained of (*Douglas*, 1893, 20 R. 793).

*Mitigation*.—In mitigation of damage, on the other hand, it may, on the same principle, be shown what the state of mind of the author of a slander was. The whole circumstances of the utterance may be proved (*White*, 1847, 10 D. 332), in order to show that information supplied to him was such as to lead him to suppose that the charge was true (*Cunningham*, *supra*; *Ogilvie*, 1836, 14 S. 729); or that he had received provocation (*Tullis*, 1850, 12 D. 867; *Paul*, 1884, 11 R. 460); or that the charge was matter of common report (*McCulloch*, 1851, 13 D. 960. See Cooper on *Defamation*, pp. 243–51). But where the defender is not the writer, but only the publisher of a libel, he will not be allowed to prove, in mitigation, circumstances which might have affected the writer, but of which the defender was ignorant (*Brown*, 1889, 16 R. 368).

*Compensatio injuriarum*.—The rule which, in cases of breach of contract, excludes a counter claim not founded on the same subject-matter, also excludes the setting off of one injury against another, since the foundation of the claim and counter claim are separate wrongs. See COMPENSATIO.

*RELIEF*.—In delict, this action is generally applicable where the pursuer and defender have been under a common obligation, which ought first to have been performed by the defender, and which, by his neglect, has been cast upon the pursuer, so that the pursuer, having been sued, has been forced to pay damages. These damages, together with the costs of his adversary, and his own costs in the suit, constitute the aggregate sum recoverable in the action of relief (per Ld. Chan. Campbell, *Colt*, 1860, 3 Macq. 833, 840). There are therefore three conditions necessary for the success of an action of relief: (1) that the pursuer was bound to pay; (2) that defender, if he had been sued, would have been bound to pay; (3) that the liability of the defender is exactly commensurate with that of the pursuer claiming the relief. On the first of these grounds an action of relief is excluded where no claim has been made against pursuer (*Elliot's Trs.*, 1894, 21 R. 858), or where it has been unnecessarily admitted, as where a master voluntarily pays damages to injured workmen, which it appears he is under no legal obligation to pay (*Kiddle*, 1885, L. R. 16 Q. B. D. 605; *Orington*, 1864, 2 M. 1066; *Gardner*, 1894, 22 R. 100); on the second, where the pursuer is obliged to pay on account of a breach of duty incumbent on him, but not existing between the defender and the party injured (*Colt*, *supra*; *Clarke*, 1896, 23 R. 442); and on the third, where the pursuer is liable in delict, and it is sought to hold the defender liable in breach of contract (*Orington*, *supra*).

Where the party claiming relief has paid, partly on his own account and partly on behalf of him from whom relief is claimed, as in the case of co-delinquents, he is entitled to recover the amount paid on account of the other delinquent. The respective shares of contribution are fixed by equal division among the whole delinquents, and not by apportionment in accordance with different degrees of culpa (*Palmer*, 1894, 21 R. (H. L.) 39). This remedy is, however, available only to those who have committed a quasi-delict, and not to those whose acts or omissions are tainted with fraud or other moral delinquency (per Ld. Watson, *Palmer*, p. 46).

Relief is also competent where the party claiming it has had to pay on

the ratio of the maxim *facit per alium, facit per se*. The simplest case is that of a master who had to pay on account of his servant's negligent act: but the right of relief has been allowed where the relationship is not so close. An employer of a builder, whose unskilful operations in excavating the foundations of a house injured neighbouring property, having settled the claim of damage with his neighbour, was found entitled to relief against the builder (*Pollock*, 1856, 18 D. 1311); and a proprietor who employed a plumber to repair water pipes, which, being unskilfully done, caused damage by flooding to a tenement below, and who was sued and had to pay, recovered from the plumber the amount of damage so paid, and also the expense of defending the original action (*M'Intyre*, 1883, 11 R. 64).

[Mayne on *Damages*; Sedgwick on *Damages*.]

**Damnum** is used in the Roman texts (1) in its ordinary meaning of harm, injury of any kind, and (2) in the more specific sense of loss or injury sustained by a person in respect of his property—patrimonial loss (*D.* 39. 2. 3). In the latter sense, it covers not only the loss of property already acquired (*damnum emergens*), but also loss of gain or profit which a person could reasonably have counted on, but which he is prevented from realising (*lucrum cessans*), e.g. when a slave, who has been instituted heir to someone, is killed by the fault of a third person before he has entered on the inheritance, the master can recover not only compensation for the slave, but the value of the succession of which he has been deprived.

The Roman law of reparation for damage to property centred round the AQUILIAN LAW (*q.r.*) (*Dig.* 9. 2: *Inst.* iv. 3). It gave a remedy for *damnum injuria datum*, wrongful damage. The requirement of *injuria* implied, first, that the person causing the damage was not entitled to do the act in question; if he acted in the fair exercise of a right which belonged to him (e.g. as a magistrate, in self-defence, etc.), he was not liable, *nemo damnum facit, nisi qui id fecit, quod facere jus non habet* (*D.* 50. 17. 151). It implied, secondly, that the damage was due to an act or omission for which the person in question was responsible—there must be *dolus malus* or *culpa* on his part: as a rule, there was no liability for damage caused by accident (*casus*). Damage done without any unlawful intent was described as *damnum sine injuria*, e.g. the damage done by a tame or domesticated animal (*pauperies*) (*Inst.* iv. 9 pr.).

The expression *damnum absque injuria* is of frequent occurrence in Scots and English law in the sense of damage unaccompanied by legal wrong, and therefore not actionable (see *Andrew*, 1873, 11 M. (H. L.) 13; *Wilson*, 1876, 4 R. (H. L.) 29; *Smith*, *Leading Cases*, ii. 297 sq.; *Broom*, *Common Law*, p. 71 sq.).

See *ÆMULATIO VICINI*.

**Damnum fatale.**—This is a plea taken by a defender when he attributes the loss of which the pursuer complains to inevitable ACCIDENT (which see). It is a plea applicable, both in contract and in wrongs independent of contract, excusing the non-performance of the contract obligation in the one, and negating negligence as the cause of injury in the other. The plea is founded on the principle expressed in the maxim, "*lex non cogit ad impossibilia*," and its application to the law of contract has been explained as follows by Hannen, J.: "We have first to consider what is the meaning of the covenant which the parties have entered into. There

can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance; and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of, the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is, in fact, an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the thing done, or left undone, was so by the act of God, what is meant is that it is not within the contract" (*Baily*, 1869, L. R. 4 Q. B. 185). Thus if a lessee obliges himself to leave a wood in as good a condition as at his entry, and the trees are afterwards blown down by a tempest, he is released from his obligation to restore or pay damages, because the contract is understood to refer only to things within the lessee's power (*Baily, supra*); or where a landlord lets a house which is rendered uninhabitable by a subsidence of the ground, not due to his acts, he is not liable for the damage thereby sustained by the tenant (*Allan*, 1891, 18 R. 932). *Dammum fatale* is also a defence to an action brought under the edict *Nauta, caupones, stabularii* (Ersk. iii. 1. 28).

In delict, a defender escapes liability by showing that the loss complained of was due to a *dammum fatale*, and not to his act or omission. This defence has been sustained where erections lawfully made on defender's land, for the enjoyment of his property, have collected, and then given way before, unprecedented rainfall, although before the erections the rainfall might have been harmless (*Tennent*, 1864, 2 M. (H. of L.) 22; *Nichols*, 1876, L. R. 2 Ex. Div. 1). But if the embankment is erected on a place where a flow of water may be expected (*Potter*, 1864, 3 M. 83; *Great Western Railway of Canada*, 1863, 1 Moore, P. C., N. S. 101, 121), or if the water is allowed to escape by opening flood-gates, the defender will be liable (*Dixon*, 1881, L. R. 7 Q. B. D. 418). If the damage arises partly from negligence and partly from *vis major*, the defender, if the effects are distinguishable, may prove how much of the damage is due to the *vis major* (*Nitro Phosphate Co.*, 1878, L. R. 9 Ch. Div. 533). [Glegg on *Reparation*, 277-281.]

**Date of Deed.**—*GENERAL*.—The date of subscription of a deed is not, and has never been, essential to its validity (Ersk. iii. 2. 18; *Ogilvie*, 1711, Mor. 16896; *Wemyss*, 1821, 1 S. 47; affd. 1825, 1 W. & S. 140), although Stair (iv. 42. 19: see also *Crawford*, 1666, Mor. 16927) expressed a contrary opinion. In point of fact, our early deeds were undated. It is, however, the universal practice, and it is highly expedient (except in notarial instruments, hereafter referred to) to insert the date, which may have a material bearing on the validity of the deed: in cases, for example, where the question of the minority, or mental capacity, or solvency of the granter may arise, and in testamentary writings where the difficulty may occur as to which is the later deed, as well as questions with reference to the capacity of the testator. The date was also of importance in *mortis causâ* dispositions of heritage before the abolition of the law of deathbed. A probative deed, signed before two witnesses, proves its own



date. Poidings, arrestments, inhibitions, and other public acts—*fuga* warrants being an exception (*Kempt*, 1786, Mor. 8554; *Blair*, 1821, 1 S. 107)—executed on a Sunday are null (cases in Mor. *Dir. voce* "Sunday," p. 15001 *et seq.*), but it is no objection to a private deed that it is signed on a Sunday (*Duncan*, 1684, M. 15003). "It is very wrong certainly to transact business on a Sunday, but if so done is not null" (Ld. Jeffrey in *Eliot*, 1844, 6 D. 411).

The date of a deed under the Bankruptcy (Scotland) Act, 1856 (Act, s. 6, re-enacting a similar provision in the repealed Act), or under the Act, 1696, c. 5, is the date of the recording of the sasine, where sasine is requisite, and, in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall, in the particular case, be requisite for rendering such deed completely effectual.

In a description of lands by reference to a prior recorded deed under the Conveyancing Act, 1874, s. 61, and Sched. O., the omission to specify the day of the month on which the prior deed was recorded will not invalidate the subsequent deed (*Murray's Tr.*, 1887, 14 R. 856).

**HOLOGRAPH WRITINGS.**—These prove their own dates as against the granters where third parties are not concerned (*Dunfermline*, 1674, 1 Bro. Supp. 703), and holograph letters intimating assignments and acknowledging the notices are proof of the date of intimation even in a question with an arrester (*Selkirk*, 1708, Mor. 4453: rev. 1708, Robertson's App. 1); but in questions with third parties holograph writings do not, unless signed before witnesses, prove their dates, which must, where necessary, be established otherwise (*Temple*, 1636, and *Calderwood*, 1668, Mor. 12490, 12607; *Winton*, 1831, 9 S. 662; *Purvis*, 1869, 7 M. 764). Were this not so, holograph writings might be ante-dated or post-dated by the granters.

With regard to *Holograph Testamentary Writings* there is a special statutory provision. Sec. 40 of the Conveyancing Act, 1868, provides that every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears; and accordingly there is now a presumption in favour of the date, which may, however, be rebutted by proof *prout de jure*. The date is obviously of importance in these documents in the circumstances before pointed out.

**INSTRUMENTS OF SASINE AND NOTARIAL INSTRUMENTS.**—Instruments of sasine, previous to the Infefment Act of 1845, set forth the day, month, and year of our Lord, and also the year of the sovereign's reign. (For the history of the practice, see Ross, ii. 180.) Both dates must correspond, and the weight of authority is that both dates were necessary (*Brechin*, 1840, 3 D. 216; *Lindsay*, 1844, 6 D. 771; *M'Farlane*, 1853, 15 D. 708), but the omission of the day of the month, the month and year being correctly stated, and the sasine being recorded before the expiry of the month, was held by a majority of the Court,—there being no question of deathbed, bankruptcy, or other competition,—not to nullify the infefment (*Dickson's Trs.*, 1820, Hume, 925). The Act of 1845 made registration of the sasine not merely publication but infefment, and the form of instrument given in the schedule to the Act (Sched. B) does not contain a date either in the body of the instrument or in the testing clause. The form of testing clause of notarial instruments under the Titles Act of 1868 (Sched. 1) does not, following the form of 1845, specify the date, which is immaterial, as the instrument only takes effect from the date of recording in the Register of Sasines. The insertion of the date, however, would not, it is thought, nullify the instrument.

*BILLS OF EXCHANGE.*—The Bills of Exchange Act, 1882, provides that a bill is not invalid by reason that it is not dated (s. 3, subs. 4); that where a bill payable at a fixed period, either after date or at sight, is undated, any holder may insert the true date of issue or acceptance; and (a) where the holder, in good faith and by mistake, inserts a wrong date, and (b) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, it shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date (s. 12); that where a bill, or an acceptance or any endorsement on a bill, is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or endorsement; and that a bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday (s. 13); and that any alteration of the date is material (s. 64, subs. 2).

**Day.**—A space of time containing twenty-four hours. The true solar day is the interval of time which elapses between two consecutive returns of the same terrestrial meridian to the sun. This is not always of the same absolute length, and accordingly, the mean solar day is used for computing time for civil purposes. The mean solar day is the time in which the earth would make one revolution on its axis as compared with the sun, if the earth moved at an equable rate in the plane of the equator. In four days during each year the real solar and mean solar times coincide. In other days the sun is either before or behind the mean time. In our law and in that of most European nations (following the rule of the ancient Egyptians), the day is held to begin at midnight. The Arabians began their day at noon; the Jews, Italians, and Chinese held the day to begin at sunset; the Greeks, at sunrise.

By the Interpretation Act of 1889, 52 & 53 Vict. c. 63, s. 36, it is enacted that where an Act is said to come into operation on a particular day, it shall be construed as coming into operation immediately on the expiration of the previous day. Where a person is bound to do something within a certain number of days, the general rule is that he is in time up to midnight on the last day, and that the days begin to run excluding the day on which the obligation was undertaken. Thus if A. undertakes on the 2nd January to perform some act within ten days, he is in time up till midnight on the 12th (*Ashley*, 1873, 11 M. 708; *Thomson*, 1878, 5 R. 561). On the other hand, in accordance with the maxim *dies inceptus pro completo habetur*, where a right passes to a person after so many days, the right is acquired when the last of the days has commenced. Thus, by this rule of common law, in the case of challenges under the Act of 1696, the sixty days are held to have expired the moment the sixtieth day has begun. There is a different rule laid down by the Bankruptcy Act of 1856, 19 & 20 Vict. c. 79, s. 5, which enacts that "periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run" (see *Myles*, 1893, 20 R. 818; and *Wilson*, 1891, 19 R. 219). This applies to the case of equalising of diligences under the 12th section of the Act (*Stiven*, 1891, 18 R. 422). By the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 14, where a bill is payable at a fixed period after date, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the day of payment. By sec. 92, where the time limited for doing any act or thing is less than three days, in reckoning time non-business days are excluded (see DAYS OF GRACE). An action cannot be

called till after the midnight of the last day of citation. In calculating Reclaiming Days, the day on which the interlocutor is pronounced is not counted. By sec. 44 of A. S. 16 Feb. 1841, in all notices of motion under this A. S. in which any number of days' notice requires to be given for business to be done, the days are to be computed by excluding the day on which notice is given, and including the day on which the business is to be done. By the old law of deathbed, a deed was reduced in a case where the testator had lived for fifty-nine days and three hours after executing it (*Ogilvie*, 1796, 3 Pat. 434). But the rule was held not to apply to a deed the granter of which survived till the forenoon of the sixtieth day after executing the deed, the day of execution not being included (*Mitchell*, 1801, M. App. Deathbed, No. 4). In cases of demurrage, a fraction of a day is reckoned as a whole day (*Hough*, 1879, 6 R. 961). See LAY DAYS.

In another sense, the word day is used as meaning the hours between sunrise and sunset. By sec. 3 of the Day Trespass Act, 2 & 3 Will. iv. c. 68, "day" is held to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset; and by the Night Poaching Act, 9 Geo. iv. c. 69, s. 12, night commences at the expiration of the first hour after sunset, and concludes at the beginning of the first hour before sunrise.

The expression "lawful days" is used to mean the days on which judicial or legal proceedings can competently be carried on. Sundays, or fast days appointed by Government, are not lawful days. Arrestments or inhibitions used on Sunday are null on the ground that they proceed *auctoritate judicis*. On the other hand, private acts performed by an individual are not null because they are performed on a Sunday (*Elliot*, 1844, 6 D. 411). A bond or bill granted on Sunday forms a good obligation. There are several Acts dealing with Sabbath observance (1661, c. 18; 1696, c. 31), to prevent Sunday trading, etc. It has not been judicially decided that these Acts are no longer in force (*Bute*, 1870, 1 Coup. 495; *Phillips*, 1837, 2 S. & M'L 465). Criminal warrants may be executed on a Sunday; and a verdict returned on a Sunday, when a criminal trial had lasted past midnight on Saturday, was held to be good (*Rosenberg*, 1842, 1 Broun 367). In a recent civil case (*Arthur*, 1895, reported on another point, 22 R. 904), the verdict of a jury was returned early on a Sunday morning.

**Days of Grace.**—Originally the payee of a bill of exchange was not entitled to demand, as a right, any days of grace, but was bound to pay the bill on its due date, as appearing from the face thereof. The allowance of any days of grace was merely gratuitous and depending on the inclination of the holder of the bill. In *Brown*, 4 T. R. 151, it was said to have been once decided that days of grace were not allowed on inland bills. The laws of certain commercial countries have, however, long since recognised days of grace as a right of the acceptor in all cases where the bill is payable after the lapse of a certain time from its date, unless the bill otherwise provides, as where it is drawn payable "*ex grace*," "*sans grace*," "fixed," or the like.

*No Days of Grace on Bills payable on Demand.*—No days of grace are allowed on bills payable on demand; that is, on bills expressed to be so payable, or on sight, or on presentation, or in which no time for payment is expressed.

*Days of Grace abolished in most Countries.*—In most countries days of grace have been abolished, but they are still recognised in the United Kingdom, the United States, Russia, Portugal, and some of the smaller States (Thorburn on *B. of E. Act*, 45).

*Number of Days of Grace.*—The number of the days of grace allowed varies, but in the United Kingdom three days of grace are, with the exceptions above stated, added to the time of payment as fixed by bill, and the bill is due and payable on the last day of grace. The three days are reckoned by excluding the day from which the time begins to run, and including the day of payment. A bill drawn in a country where no days of grace are allowed, but payable in a country where days of grace are allowed, is payable on the last days of grace (*B. of E. Act*, s. 72 (5)). No right of action accrues to the holder of a bill until the expiry of the last day of grace, and accordingly an action raised on the last day of grace was dismissed as premature (*Kennedy*, 1894, 2 Q. B. (C. A.) 759). As to due date of bill where last day of grace falls on a Sunday, Christmas Day, Good Friday, or on a bank holiday, see article on *BILLS OF EXCHANGE*, vol. ii. p. 83.

*Instalment Bill.*—Where a bill is payable by instalments, three days of grace are allowed on each instalment.

*Cheque.*—No days of grace are allowed on a cheque.

See *BILLS OF EXCHANGE*.

**Dead Body.**—According to Alison (*Prin.* p. 461), “our practice recognises no property in the bodies of deceased relations after they have been committed to the grave.” Whether before burial a husband, wife, or next of kin has any right of property in the body of a deceased wife, husband, or relation, is open to doubt, and they may probably be more accurately looked upon as merely the lawful custodiers of the body. The right of the custodian to dispose of the dead body, besides being regulated by the ordinary laws of decency and sanitation, is limited by Statute; while even the wish of the deceased, expressed before death, as to the disposal of his own body may be interfered with by any known relative after his death (see *ANATOMY ACTS*). Our law would never approve of the arresting of a corpse for debt (see III. *Brown's Supplement*, 1677, page 136).

As to the legitimate removal of bodies after burial, see *BURIAL*. The removal of bodies from graves without authority, or the crime of “body-snatching,” has been almost rendered obsolete by the operation of the *ANATOMY ACTS* (*q.v.*). In recent years only one case is reported (*Soutar*, 1882, *Coup. v.* 65), in which the sentence was penal servitude. According to Hume, the offence “cannot in any proper sense be regarded as a theft, but may be prosecuted as a great indecency and as a crime of its own sort, the *crimen violati sepulchri*” (Hume, i. 85); but an indictment for the theft of a corpse before burial has been held relevant (see case of *McKenzie*, 1733, *Burnett*, p. 124). Formerly the punishment was by fine, whipping, imprisonment, or penal servitude, according to the gravity of the offence. It is unlawful, under any circumstances, to remove, or attempt to remove, a body from a grave without authority. The crime of removal is complete if the body be in any way disturbed in its resting-place, while a conviction for attempt may be obtained although the body itself may have been neither touched nor exposed to view (Alison, i. 463). In the note to the above reference to Hume on *Crimes* will be found a list of the older cases, which, with the case of *Soutar* quoted above, complete the reported instances

of the crime.—[See also *More, Notes to Stair*, cclxxxvii.: *Macdonald*, 76.]  
See ANATOMY ACTS: BURIAL: VIOLATING SEPULCHRES.

**Dead Freight.**—Dead freight is the name applied to the sum payable as damages by the charterer of a ship to the shipowner in respect of stow-room which he has failed to fill up with cargo in accordance with the charter party. Strictly, this is not freight, but “compensation for the loss of freight, recoverable in the absence and place of freight” (*Phillips v. Rodie*, 1812, 15 East, 547, p. Ld. Ellenborough). In some cases the amount so payable is ascertained or ascertainable from the charter party. More frequently it has to be estimated by an average, allowance being made for expense saved to the owner by the short shipment, and for any profit which may have been made by carrying the goods of other persons. The shipowner’s lien over cargo for freight does not, at common law, cover dead freight, but is often extended to do so by the terms of the cesser clause in the charter party. It has been questioned, in English cases, whether the term “dead freight,” so used in a charter party, is not to be limited to liquidated damages ascertained from the charter party itself. The House of Lords, however, would seem to have laid down, in a Scotch case, that an unliquidated sum may be covered where that is clearly contracted for (*McLean*, 1871, 9 Macp. (H. L.) 38: but see *Gray*, 1871, L. R. 6 Q. B. 522).

[Scrutton on *Charter Parties*, art. 161; *Abbott, Merchant Ships*, p. 547.]  
See CHARTER PARTY: FREIGHT.

**Dead’s Part.**—This is the technical name of that portion of a person’s moveable estate that may be disposed of by will. Its extent varies inversely with the extent of the person’s domestic relationships. In the case of a person dying unmarried and childless, it is co-extensive with his whole moveable estate. Where the person leaves either issue or spouse, the dead’s part is one half of the moveable estate, the other half being the *jus relicta* or *relicti* of the spouse, or the *legitim* of the issue. Where the person leaves both issue and spouse, the dead’s part is one third, another third being *jus relicta* or *relicti* of the spouse, and the remaining third *legitim* of the issue. Previous to the passing of the Married Women’s Property Act, 1881 (44 & 45 Vict. c. 21), this statement would only apply to the case of the husband; but that Act placed the wife in the same position in this matter. The statement has reference only to a person who is not subject to the conditions of a marriage contract. Where the dead’s part is not disposed of, in whole or in part, by will, it falls to the next of kin of the deceased. As a general rule, all burdens falling on the representatives in moveables of the deceased are payable out of the aggregate moveable estate before any division is struck. Burdens in the nature of legacies, gratuitously created by *mortis causa* deed, are, however, a charge on the dead’s part only. Thus though the funeral expenses of the deceased are a charge against the whole moveable estate, yet, where the deceased has by will burdened his estate with the expense of building a monument to himself, this is a charge against the dead’s part only (*Moncrief*, 1713, Mor. 3945). Personal bonds bearing annualrent fall to be deducted from the dead’s part in a question with the widow of the defunct claiming her *jus relicta*, “unless they have become moveable by a charge, or that the term of payment of the annualrent is not come at the defunct’s death”

(*M'Kenzie*, 1668, Mor. 5784). Thus "a sum due to a banker upon an open account affects the *jus relictæ*," as it is a charge on the aggregate moveable estate; "yet if a bond be given for the same debt, when the term of payment expires, it does not affect the *jus relictæ*," but is a charge on the dead's part only. "The general rule is that a bond, having a clause of interest, upon expiry of the term of payment, does not affect the *jus relictæ*" (*Ross*, 14 Nov. 1816, F. C.). The reason why sums in a personal bond bearing interest when matured are not to any extent chargeable against the *jus relictæ*, is "because by the Act of Parliament (1661, c. 32), the relict has no share of such sums if they were due to the defunct; and, therefore, *à pari*, she cannot be burdened with such sums, being due by the defunct" (*M'Kenzie*, 1668, Mor. 5784). The dead's part can only be taken up on a title completed by confirmation, while the right of the spouse to *jus relictæ* or *relictæ*, and the right of the issue to *legitim*, vest directly, without legal process, on the death of the defunct.

See SUCCESSION.

**Deaf and Dumb.**—See WITNESS: DECLARATION BY PRISONER.

**Dean of Faculty of Advocates.**—The Dean is the official head of the Faculty of Advocates, who presides at their meetings and signs their Acts. In Court he leads all members of the Faculty except the Lord Advocate. He is elected annually at the anniversary meeting of the Faculty, held on the second Wednesday after the Christmas recess.

**Dean of Guild.**—The Dean of Guild is the president or head of the body or incorporation known as the Guild Brethren or Guildry, composed of merchants and tradesmen, and is president of the Dean of Guild Court. In Edinburgh, Aberdeen, Dundee, and Perth, the Dean of Guild is elected by the Guildry, while in Glasgow he is elected by the Merchants House. In each of these burghs the person elected to the office is a constituent member of the town councils of these burghs respectively, but in all other burghs the office and title of Dean of Guild were by 3 & 4 Will. IV. c. 76, s. 19, declared to cease and determine. The title is still, however, kept up throughout Scotland, and the president of the Court is still called by courtesy the Dean of Guild. In burghs not having a Dean of Guild, the provost of the burgh is head of the Court.

1. *The Dean of Guild Court is constituted* in the various burghs either according to charter, the set of the burgh, or Act of Parliament. In Edinburgh, it is composed of the Dean of Guild and ten members, appointed annually by the magistrates and council, five of whom are councillors, and five registered electors of the city, not being councillors, of whom three are persons carrying on, or who have carried on, business as architects, civil engineers, ordained surveyors, or master builders. Three members of the Court, with or without the Dean, form a quorum. By the Edinburgh Municipal and Police Amendment Act, 1879, the Court has power to appoint one of its members to preside and act as interim Dean in the absence of the Dean, and by the Act of 1882 the magistrates and council may fill up vacancies in the Court *ad interim*.

In Glasgow, the Court is composed of eight persons, appointed annually,

—four merchants, of whom the Dean of Guild is one, and four craftsmen,—all Guild brethren, who must be men of good fame, knowledge, experience, care, and zeal to the common weal, the most worthy men of both ranks. The lymers of Court are appointed the next day after the Dean of Guild is chosen,—those of the merchant rank by the Dean of Guild and directors of the Merchants House, and those of the crafts rank by the deacon convener and deacons of crafts and their assistants, commonly called the Trades House. The Merchants House appoints the Dean, and there is usually a Sub-Dean appointed. The election is annual, but the members are usually in office for two years.

In Dundee, Greenock, and Perth, the Court is presided over solely by the Dean of Guild. In Aberdeen, the functions of the Dean of Guild Court are performed by the town council, the Dean of Guild being convener of its plans committee.

Most of the other burghs are subject to the provisions of the Burgh Police (Scotland) Act, 1892, which provides that the Dean of Guild Court shall consist of the Dean of Guild or provost of the burgh, and not less than two of the commissioners, who may be magistrates, and shall be elected annually. Any member of the Court personally interested in a matter is prohibited from sitting while it is under consideration.

2. *The jurisdiction of the Court* comprehends practically: (1) the examining and sanctioning of plans for the erection, repair, alteration, taking down, and re-erection of houses and other buildings, including the height and structure thereof; (2) securing the stability and lining of such with reference to the rights of neighbouring proprietors, the roads and streets of a burgh, and protecting the interest of the public generally; and (3) the repair, demolition, or sale of old or ruinous properties, or those burned and left unrestored.

The Dean of Guild Court is entitled, in order to the proper exercise of its jurisdiction, and for the due and proper regulation of the business coming before it, to frame rules for the Court, provided these be made in conformity with law (Ersk. B. i. tit. 8).

Thus this Court can make and enforce a rule that plans for the erection or alteration of buildings shall be laid before it, and that even though these buildings be entirely within the private property of the owners (*Eglinton Chemical Co.* 28 S. L. R. 41). But this does not apply to alterations which are purely internal and not dangerous to the lieges (*Speed*, 1883, 10 R. 795). The operation must, moreover, be of a permanent or structural character (*Donaldson*, 1834, 13 S. 27); and when the Dean's aid is invoked regarding an encroachment, it must be of a recent nature (*Graham*, 1838, 1 D. 171).

In addition to the common-law jurisdiction thus vested in the Dean of Guild Court, in nearly all of the burghs it has additional jurisdiction conferred by Statute. Thus in Edinburgh it sees that the buildings to be erected are in conformity with the provisions of the Edinburgh Municipal and Police Acts, and with the building rules enacted thereunder. It also takes cognisance of the provisions of certain general Statutes, and sees that the buildings to be erected comply therewith, such as the Factory and Workshops Acts; the Cattle Sheds in Burghs (Scotland) Acts; the Roads and Bridges Act; and the Public Health Acts.

Similarly in Glasgow, the Dean of Guild Court, while seeing that the stipulations of the common and statute law applicable to Scotland are duly complied with, has special local powers to see them enforced. These are to be found chiefly in the Glasgow Police Act, 1866, and Acts amending

the same, and the Glasgow Buildings Regulations Act, 1892, and bye-laws made under the last Act. These bye-laws are of a somewhat similar nature to those appended to the Burgh Police Act of 1892, and compliance therewith is enforced in the Dean of Guild Court in Glasgow.

In Dundee, Greenock, and some other towns, there are special private Acts applicable to the particular burgh only, which confer additional powers on the Dean of Guild Court, which require to be kept in view.

So likewise in burghs under the Burgh Police (Scotland) Act, 1892, the Dean of Guild is invested with additional powers and duties. By clause 201 of the Act, it is provided: "In burghs where there is a Dean of Guild Court at the commencement of this Act, or where such Court shall be established, as hereinafter provided, the Dean of Guild Court shall come in room and place of the commissioners for carrying out the provisions of this Act, in so far as they apply to new buildings, or alteration of existing buildings, ventilation, and precautions during the construction, alteration or repair of buildings and streets, and to old and ruinous tenements, and to the setting up of hoardings; and in that case all the powers and duties of the commissioners in reference to these provisions, and also in reference to the inspection of buildings in process of construction or alteration, or any work connected therewith, and the surveying and certifying of buildings before occupation, shall devolve on, and be carried out by, the Dean of Guild Court and the officers thereof, as herein provided for; but nothing herein contained shall be taken to restrict or prejudice the jurisdiction, or to alter the constitution of, any Dean of Guild Court as existing at the commencement of this Act": and by clause 177 of said Act it is provided that "with regard to new buildings, the rules contained in Schedule IV. of this Act shall be observed, but such rules may be altered by the commissioners with the approval of the Sheriff."

Those rules make provisions regarding the excavations, walls, joists, gutters, chimney-heads, floors, and roofs of buildings, as well as the plaster and plumber work thereof, and the paving of passages and courts in connection therewith, for the details of which reference is made to the schedule.

They also deal with the examination and sanction of plans for the erection, repair, alteration, and taking down of buildings, including height and structure.

The Dean of Guild has no jurisdiction to try a question of heritable right (*Neilson*, 1750, Mor. 7584; *Pitman*, 1881, 8 R. 914). But he may look at titles and settle any possessory point (*Macneil*, 1866, 4 M. 447; *Johnston*, 1862, 24 D. 709); or to expiscate an alleged right of servitude (*King*, 1896, 34 S. L. R. 54). When, however, titles are to be cleared up, or a question of heritable right decided, the Dean of Guild Court is not competent to do this (*Cruickshank*, 1854, 17 D. 288; *Walker*, 1888, 15 R. 477). If a competition of heritable right arises, the proper course is to sist the process, to afford an opportunity of the question being settled by the Supreme Court (*Smellie*, 1868, 6 M. 1024); and if the party fail to do this at the proper time, he may find himself barred afterwards (*Wilson*, 1895, 23 R. 13).

Nor has the Dean of Guild Court any jurisdiction to consider or try whether the use to which a building is to be put shall form a nuisance or not (*Manson*, 1887, 14 R. 802; *Robertson*, 1887, 14 R. 822). This is subject, however, to the qualification, that "where certain kinds of works have been ticketed by law as nuisances, the Dean of Guild may refuse a lining, because the law holds that they cannot be carried on without constituting a nuisance. If, for instance, it was proposed to set up a blubber



or glue work in one of the divisions of Princes Street, the Dean of Guild might refuse a lining, because the structure which it was proposed to erect was adapted to the purposes of an unlawful trade, and to such purposes only" (per Lord Pres. Inglis in *Kirkwood*, 1888, 16 R. 255). The Dean of Guild Court has no right to hold *ex proprio motu* that magistrates are prohibited from erecting a hospital within burgh without consent of the Local Authority (*Mags. of Edinburgh*, 1895, 23 R. 44).

The Dean of Guild Court has likewise jurisdiction with regard to the taking down, rebuilding, or repairing ruinous tenements. The order of the Dean in such cases is called a *judge and warrant*. Proceedings in regard to such are, however, now most frequently conducted under the provisions of the Police Act applicable to the burgh, or under the Burgh Police (Scotland) Act, 1892.

Another branch of the jurisdiction of the Dean of Guild Court is in regard to the roads and streets of the burgh; seeing that these are not encroached upon by buildings in any way, that obstructions thereon are prevented, and that the rights of the public are protected, by guarding against interference with the roads and streets, or the appropriation thereof to other uses. No building can be erected so as to encroach on the street (*Mags. of Montrose*, 1762, Mor. 13175): nor can the magistrates themselves feu a part of the street (*Young*, 2 Feb. 1816, F. C. 75). So, on the other hand, neither can magistrates appropriate private parties' ground in the street (*Smellie*, 1803, Mor. 7588), nor line back his house, when rebuilding, for a like purpose (*Dougall*, 1827, 5 S. 224: *Burnet*, 1849, 12 D. 44); nor are magistrates entitled to take down public buildings, to widen a street, without judicial authority (*Craigford*, 1870, 8 M. 693). The master of works or surveyor of the burgh is entitled to appear in the public interest; but when he is to object, he must lodge written objections in Court in common form (*Stewart*, 1894, 21 R. 1117).

The Crown is not subject to the jurisdiction of the Dean of Guild Court or of any of the inferior Courts (Balfour, *Practicks*, 267, No. 7, *A. v. B.*, Mor. 7321; *Somerville*, 1893, 20 R. 1050).

3. *The procedure* in the Dean of Guild Court is chiefly regulated by the Acts of Sederunt of 12 Nov. 1825, 9 Mar. 1826, 6 Mar. 1829, 8 July 1831, 13 Feb. 1845, 10 Mar. 1849, and 15 Feb. 1851. By the 6 Geo. iv. c. 32, the Court of Session is now authorised, by any Acts of Sederunt, to make and establish rules and regulations for the Sheriff and Stewart Courts in civil causes; and by sec. 7 it was enacted that any such Act of Sederunt, and the regulations thereby made for the Sheriff and Stewart Courts, should apply to and receive effect in the Courts of royal burghs in Scotland. By sec. 31 of 1 & 2 Viet. c. 119, it is provided that all Acts of Sederunt passed by the Court of Session shall, in terms of the 6 Geo. iv., apply to and receive effect in the Courts of the royal burghs of Scotland, as well as in the Sheriff Courts. By the Act of Sederunt of 18 July 1851, the Act of Sederunt of 13 Feb. 1845, as to records in Sheriff Courts, is repealed: and the regulations contained in the Act of Sederunt of 18 July 1839, in so far as they are at variance with these enacted, or anywise incompatible with them, are also repealed.

The procedure begins by the presentation of a petition to the Dean of Guild Court, to which answers are usually to be lodged: and if this be done, a record is made up in common form. Proof is not often resorted to, the matter in dispute being generally solved by a visit of the Court. When the judgment is pronounced, it ought to be signed by the Dean (*Devlop.*

1824, 3 S. 268), and it should not bear any correction (*White*, 1873, 11 M. 602).

4. *An appeal* may be taken against a judgment of the Dean of Guild Court, within twenty days after the date of the judgment complained against, by writing, on the end or on the margin of the interlocutor sheet containing the judgments appealed from. The pursuer or defender, or other party, appeals to a Division of the Court of Session. During that period of twenty days it is incompetent to give out extract. If the judgment be not extracted, appeal is competent any time within six months, but after that time it is incompetent.

The Dean of Guild Court is also entitled to enforce its regulations and procedure by fine and imprisonment. Thus it is entitled to try and punish by fine and interdict for building without warrant, for contravening the rules and regulations of Court, for contravention of the statutory provisions which it has jurisdiction to enforce, and for breach of its warrants. It may also punish for contempt of Court. Some of these proceedings may be *quasi*-criminal, or criminal proceedings, and care must be exercised in conducting them. An appeal lies to the High Court on circuit, and a case also may be taken under the Summary Prosecutions Appeals (Scotland) Act, 1875, for such cases as are appropriate to be dealt with in that manner. (See, under these headings, Campbell-Irons on *Dean of Guild Law*.)

**Deans of the Chapel Royal.**—The Chapel Royal, which was founded in Stirling Castle by King Alexander I. (1107–1124), received from Pope Alexander VI. (1493–1503) the constitution of a collegiate church. The clergy on this foundation were a dean with episcopal jurisdiction, a sub-dean, sacristan, chanter, treasurer, archdean, and sixteen chaplains. The chapel was endowed with lands and teinds from the royal domains, and became the appropriator of several parishes. It was partially suppressed at the Reformation, and the benefice was resumed by the Crown. From 1567 till 1606, the clergy appointed to the vicarage of the chapel were styled Ministers of the King's House. In 1606, the chapel was reformed to some extent by Act of Parliament. The title of dean was revived, and the place of the chapel was appointed to be “at Halyrudhous, within the Palice of the samyn, and called His Majesties Chapell Royall of Scotland.” The office of Dean of the Chapel Royal is in the gift of the Crown. Since 1727, the benefice of the Chapel Royal has been divided in three parts. In pursuance of the recommendations of the Scottish University Commissioners' Report, 1863, one deanery revenue is now applied to the support of the Chair of Biblical Criticism in the University of Edinburgh. The Chairs of Divinity at Edinburgh, Biblical Criticism at Glasgow and at Aberdeen, and Ecclesiastical History at St. Andrews, have half a revenue each. The practice of the Crown in conferring titles of Dean on the holders of these portions of the benefice has not been uniform. The present revenue of the benefice is derived from lands in the counties of Wigton, Kirkeudbright, Ayr, and Perth, and from teinds of the lands of Shaws, Hehnburn, and Balliades, now in the parishes of Ettrick and Kirkhope, in Selkirkshire. The chapel's teinds are liable to be localised upon for minister's stipend after teinds which have been acquired by heritable rights, in respect they were originally, and still continue to be, destined to pious uses (*Deans of the Chapel Royal v. Hay and Others*, 11 Dec. 1799, F. C. App. 9).—[*Stair*, ii. 8. 15; *Bankt.* ii. 8. 101; *Fasti, Eccl. Scot.* i. 393; *Regist. Dunfermlin*. 4; *Rogers, Hist. of Chapel Royal*, 1882.]

**Death.**—Death is either natural or civil. Natural death takes place when life is extinct. Of civil death there is no clear or authoritative definition in the Scottish authorities. In the Roman law, a person was *civilitèr mortuus* when he suffered *capitis deminutio* (Gaius, iii. 153). Blackstone gives as an example of civil death, the entering of a monastery (ii. 8. 1). Pothier declares that a man sentenced to the galleys for life is civilly dead (*Tr. des Personnes*, s. 95). In Scotland, and also in England, a sentence of banishment for life implied civil death (*Farquhar*, 1753, Mor. 4669; *Franks*, 1813, 7 Bing. 712); and a sentence of imprisonment for life, or for a long period, has some of the effects of civil death. At the present time, it seems that a man is civilly dead only when a sentence of fugitation has been pronounced against him. The question of the effect of civil death upon a man's powers and rights was very fully discussed in the case of *Macrae*, 1836, 15 S. 54; 1839, 1 Macl. & R. 645. Under the old law, a person *civilitèr mortuus* might be killed or mutilated with impunity. By the Act 1612, c. 3, this was altered with regard to persons denounced for civil debt; and by the Act 1661, c. 22, it is not lawful to kill a denounced rebel, except where he has been denounced a rebel for a capital crime, and where he is killed as the result of his forcible resistance of those in pursuit of him. The single and liferent escheat of a man fall when he incurs civil death. This applied, until 1748, to the case of a man denounced for civil debt (20 Geo. II. c. 50), and still applies to a man under sentence of fugitation. A man *civilitèr mortuus* has no *persona standi in judicio*, and can neither sue nor be sued in a court of law; nor is he admissible as a witness (Hume, ii. 270). He is debarred from holding any office, either judicial or fiduciary. His curatorial power as a husband comes to an end, and his wife can bind herself without his consent (*Dall*, 1733, Elchies, *voir* Husband & Wife, No. 1). But the fee of his estate does not fall under the liferent escheat, and the outlaw retains every power of disposing of his property which can be exercised without prejudice to the rights of those who have an interest in his single or liferent escheat (*Macrae*, *ut supra*). He can also succeed to an estate, which, at his death, will pass to his heir; he can validly contract a marriage, and his child, lawfully begotten and born after his outlawry, is entitled to succeed to him (see *Macrae*, *ut supra*). See DENUNCIATION; FUGITATION; OUTLAWRY.

Death, natural not civil, dissolves marriage (Ersk. i. 6. 37). Death purges vitious passive titles (Stair, iii. 6. 15). *Crimina morte extinguuntur*: crimes are extinguished as regards the punishment by the death of the criminal (Ersk. iv. 4. 103). The death, natural or civil, of a partner dissolves a private partnership (Ersk. iii. 3. 25; *Aitken*, 1830, 8 S. 753; 53 & 54 Viet. c. 39, s. 33), unless there is an express agreement in the contract of co-partnery to the contrary,—as, for example, where it is contracted that the heir of a deceased partner shall succeed him as a partner (*Hill*, 1865, 3 M. 541; see *Beveridge*, 1869, 7 M. 1034, 1872, 10 M. (H. L.) 1), or where, from the nature of the contract, it is evident that such was the intention, as in the case of a contract lasting for a term of years longer than a human life (see *Warner*, 24 Jan. 1798, F. C.; Mor. 14603; 3 Dow, 76). But a joint-stock company, whose shares are transferable, and in which there is no *delectus personarum* in the partnership, is not dissolved by the death of a partner. On the death of one partner, a surviving partner, or the executor of the deceased partner, is entitled to insist upon the winding-up of the business (*Aitken*, 1830, 8 S. 753; see *McKersies*, 1872, 10 M. 861). The death of a partner does not require intimation to third parties in order to free his representatives from liability

(*Christie*, 1839, 1 D. 745; *Aytoun*, 1844, 6 D. 1409; *Oswald*, 1879, 6 R. 461). Even where an order has been given, and has been accepted by the surviving partner before he knew of his partner's death, the representatives of the deceased partner are not liable (*Aiton*, 1769, Mor. 14573; revd. 2 Pat. App. 283). See PARTNERSHIP.

Death revokes mandate, whether it be the death of the mandant or of the mandatary (Ersk. iii. 3. 40; *Duffius*, 1628, Mor. 3166; *Scott*, 1834, 7 W. & S. 211; *Life Association of Scotland*, 1886, 13 R. 910). Where a mandate has been given to apply for sequestration, and the debtor dies before sequestration has been awarded, the mandate falls (*Mann*, 1811, referred to in Bell's *Com.* (5th ed.) ii. 319). But the mandatary may act until he receives authentic information of the death of his constituent (Ersk. iii. 3. 41; *Campbell*, 1826, 5 S. 86, 1829, 3 W. & S. 384; see *Kennedy*, 1843, 6 D. 40). See MANDATE.

When one of the parties to an action dies, the proceedings must stop until his representatives have been sisted. Formerly, in such a case, an action of transference was necessary in order to enable the representatives to go on with the action. But now the representatives of either pursuer or defender, provided that the right in respect of which the action is maintained has been transmitted to them, may lodge a minute, craving to be sisted in place of the original pursuer or defender (Act 1693, c. 15; 31 & 32 Vict. c. 100, s. 96; see *McCulloch*, 1829, 8 S. 122).

[See LIFE INSURANCE; LIFE, PRESUMPTION OF; REGISTRATION OF BIRTHS, ETC.]

**Death, Presumption of.**—According to the common law of Scotland, a person who is proved to have been once alive is not presumed, in absence of evidence, to have died until he has passed the limit of the term of life. The term of life is generally held to be a hundred years. Evidence, however, may at any time elide the presumption of life, and establish a presumption of death. Statutory presumptions of death apply in certain cases. In proceedings by the Board of Trade, under the Merchant Shipping Act Amendment Act, 1862, for the recovery of the wages of seamen, seamen who have disappeared with a ship which has been lost for a year are deemed to be dead. When a person is found, under the Presumption of Life Limitation (Scot.) Act, 1891, to have disappeared, he is presumed to have died seven years after he was last heard of, unless there is evidence that he died at some particular date within the seven years. (*The Law of Scotland in relation to Presumption of Life*, Stevenson, 1891.)

[For the main article on this subject, see LIFE, PRESUMPTION OF.]

**Death, Registration of.**—See REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

**Deathbed.**—By the law of Scotland, a man who was technically on deathbed was not considered to be competent to make a disposition of his heritable property to the injury of his heir-at-law. "The doctrine of the law of deathbed was that the heir of the person who granted a deathbed deed had a right to set it aside, on the ground that it was to his prejudice in his character as heir" (*Wyllie*, 1890, 18 R. 218, per L. J. C. Macdonald, at p. 222). The deed was technically said to be challenged or reduced *ex capite*

*lecti*. In 1871, however, this ground of challenge was abolished by Statute, which provided that "no deed, instrument, or writing made by any person who shall die after the passing of this Act shall be liable to challenge, or reduction *ex capite lecti*" (34 & 35 Viet. c. 81), and the principal interest in the subject is now historical. It is still a question whether the Statute abolished the law of deathbed with respect to written instruments only, and not with respect to gifts made without writing (*Hag*, 1890, 18 R. 244). It must be noticed, too, that this question has arisen after the opinion had twice been volunteered on the bench (*Gray*, 1872, 10 M. 854, per L. J. C. Moncreiff, at p. 858; and *Wyllie*, 1890, 18 R. 218, per Ld. Rutherford Clark, at p. 223) that the case then before the Court would be the last judgment on a point of deathbed law. The first question to be discussed is, *When is a man technically on deathbed?* This is very fully gone into by Lord Stair, and his conclusions may be thus summarised (Stair, *Institutions*, iii. 4. 28 *et seq.*). It is not necessary to allege or instruct that the deceased was at the date of the deed suffering from mortal disease, or that he was then bed-fast (*Shaw*, 1624, Mor. 3208). There is a strong presumption of sickness where the defunct has kept the house; and a deed done by a man enclosed for the plague was found reducible as done on deathbed, where it was done after the defunct was enclosed on suspicion of the plague, and he died without coming out again, it not being necessary to prove he was sick or infected when the deed was done (*Jack*, 1665, Mor. 3213). It seems that, if the contracting of sickness be proved, no contrary probaton of any acts within doors will be sufficient to elide the plea of deathbed. It is, for instance, not relevant to elide deathbed, that the defunct was in strength and ability to have come to kirk and market, or that he put on his clothes daily (*Shaw*, 1624, Mor. 3208). Formerly, the presumption raised by the defunct having kept the house was so strong, that it was found that where he lived a year and a half after the deed in question, and was only hindered to come abroad by a palsy, and did all his affairs within doors as formerly, the deed was struck at *ex capite lecti* (*Riddel*, 1637, Mor. 3212): and similarly in a case where the defunct did not only all his own affairs, but trysted for others, and lived two years and a half after the disposition, and was in like condition as he had been seven years before (*Chilard*, 1672, Mor. 3305). The presumption was, however, changed by the Scots Act 1696, c. 4, whereby it is declared that, as to all deeds made after that Statute, it shall be sufficient defence against the objection of deathbed, that the granter lived sixty days after executing the deed, though during that time he neither went to kirk nor market: but that such deeds shall still be reducible on proof that, by the sickness of which he died, the granter was not, at the time of executing them, of sound judgment and understanding.

There is a presumption—but only a *presumptio juris*—that sickness, having once been contracted, has continued till death, laying the burden of probation on the party alleging convalescence.

The ordinary and unquestionable defence against deathbed, as proving either that there was no disease, or convalescence if there had been a disease, is the going freely to kirk and market unsupported, especially if the going abroad is principally to hear sermon, or for devotion, or about affairs to the market. It is not necessary to prove that the defunct went both to kirk and market unsupported; either is sufficient (*Balmorino*, 1671, Mor. 3305). If the going to kirk or market is clearly established, it is not a relevant objection that the purpose of going was of design to validate the deed. By Act of Sederunt, 29 February 1692, it is declared that the going to kirk or market must "be performed in the daytime, and when people

are gathered together in the church, or churchyard, for any public meeting, civil or ecclesiastic, or when people are gathered together in the market-place for public market."

As to whether the defunct had gone to kirk or market unsupported, much would depend on the ordinary habits of the individual before his sickness. If the going to kirk or market be not of design to validate the deed, but be reiterated and of course, nothing that was ordinary for the defunct in taking of help, when he was in unquestionable health, will import supportation—if the going be of design, however, the least defect in the exact performance will render it ineffectual. It was Lord Stair's opinion that there might be equivalents for going to kirk or market, such as going on a far journey; but these acts were not to be measured merely by the equivalent amount of strength they inferred, as they wanted the exposure to public view and the probation of unprepossessed witnesses involved in going to kirk or market. The disease of which the defunct died must be that from which he was suffering at the date of the deed. "If a man has a disease on him which continues till the time of his death, but dies by an accident, or of a different disease, the deed executed under the first disease will not be reducible *ex capite lecti*" (*Mackay*, 1831, 5 W. & S. 210, per Brougham, L. C., at p. 226).

The second question is, *What deeds are liable to challenge?* "The law of deathbed entitles the heir-at-law to set aside all deeds executed to his prejudice by the deceased *in lecto*. . . . He is entitled to have the heritage of his ancestor free of all deeds executed to his prejudice on deathbed" (*Gray*, 1872, 10 M. 854, per Lord Cowan, at p. 860). These deeds may primarily affect moveables; still they prejudice the heir, by reducing the fund from which creditors are paid before having recourse against heritage (*Shaw*, 1624, Mor. 3208; *Cowie*, 1707, Mor. 3220). The deeds need not be gratuitous, but "when heritage is sold on deathbed for a price instantly paid, the heir has been found entitled to reduce the sale only on repeating the price to the purchaser" (*Gray, supra*, per L. J. C. Moncreiff, at p. 859). A disposition of heritage in consideration of a personal debt formerly incurred, is reducible, however, without an offer to repeat (*Gray, supra*). A deed executed on deathbed, merely exercising a power conferred on the defunct, and not done in virtue of his ownership, is not reducible. "The heir cannot complain of any exercise of a faculty which has been granted to another person in addition to another lesser state which has been granted to him, because he is not the heir of the person who is executing the instrument" (*Hay*, 1870, 8 M. (H. L.) 66, per Lord Hatherley, at p. 70; cf. *Morris*, 1853, 15 D. 716, and *Wyllie*, 1890, 18 R. 218). It is to be noted that "a right to challenge by a party's heir is one of which the renunciation is not easily to be inferred" (*Richardson*, 1848, 10 D. 872, per L. J. C. Hope, at p. 878).

The third question is, *Who has a title to challenge?* "By the law of Scotland, a deathbed deed is set aside, under certain restrictions, either at the instance of the heir of the maker of the deed, or the heir of provision to that person" (*Logan*, 1830, 4 W. & S. 391, per Brougham, L. C., at p. 393): unless, in the case of an heir of provision who is a stranger, a general power has been reserved by his author to dispoise at any time in life. "This is obvious in principle, the stranger dispoinee is bound to hold good any power reserved against him; if such power be only executed, he cannot complain" (*Craufurd*, 1806, 5 Pat. 73, per Eldon, L. C., at p. 95). A mere beneficiary under a settlement has no title to challenge *ex capite lecti*. He must be a true heir of provision under a direct conveyance of heritage. As a beneficiary under a settlement, "his right and interest is

moveable, and attachable by arrestment. Such parties are not heirs of provision in heritage, in any sense of the term" (*Shaw*, 1847, 9 D. 782, per L. J. C. Hope, at p. 789). On the death of the nearest heir, without homologating the deed made *in lecto*, the next heir has the right to challenge, even though the deed did not prejudice the deceased heir" (*Kennedy*, 1722, Mor. 3198; *Irvine*, 1808, Mor. App. Deathbed, 6). An apparent heir, whose title is not completed, is entitled to challenge (*Graham*, 1779, Mor. 3186); and the creditors of an heir have also the right (Ersk. iii. 8. 100). The Crown, as *ultimus heres*, could exercise the challenge (*Goldie*, 1753, Mor. 3183). [*Vide* Stair, iii. 4. 28 *et seq.*; Ersk. iii. viii. 95; Bell, *Prin.* s. 1786.]

**Deathbed Expenses.**—These consist of debts incurred by the deceased for medicines (*Douglas*, 1674, Mor. 11826), medical attendance (*Russell*, 1717, Mor. 11419), and nursing during his last illness, and are part of the privileged debts which may be paid by his executors out of any estate coming first into their hands. Lord Stair says: "Humanity hath given them the privilege to be preferred to other debts" (Stair, iv. 35. 3). There is no preference amongst the privileged debts, and deathbed expenses have therefore no preference over funeral expenses (*Peter*, 1749, Mor. 11852). The deathbed expenses of a wife are a privileged debt against her own estate, but not against her husband's, at least where the wife has separate estate (*Auchinleck*, 1697, Mor. 11834). The extent of the deathbed illness is not to be measured by any of the arbitrary rules applying to deathbed as a ground of reduction of deeds (see DEATHBED). In the older cases, there is a tendency to reduce the period of deathbed illness to sixty days before death (*Russell*, 1717, Mor. 11419; *Park*, 1755, Mor. 11421); while in a later case, some of the judges were of opinion it might extend to many months, some mentioning three or four months, others again limiting the period to sixty days, "though not from its having any relation to the law of deathbed." All the judges were of opinion, however, that there should be some other limitation of the period during which doctors' accounts are to be deemed privileged than the period of the incapacity of the deceased (*Lawson*, 1784, Mor. 4473).

[Stair, iii. 8. 64 and 72; Ersk. iii. ix. 43.] See PRIVILEGED DEBTS.

**Debate Roll.**—The A. S. 10 March 1870, s. 1 (1), provides that at the closing of the record the Lord Ordinary is to require the parties to state whether they renounce probation, and, if they do, he is to appoint the cause to be debated in the debate roll. If, however, the parties are at variance as to whether there should be a proof, or as to what proof should be allowed, or if there are preliminary pleas to be disposed of, the Lord Ordinary is to appoint the cause to be enrolled in the procedure roll (s. 1 (3)). The debate roll proper has now ceased to exist under that name, and cases in which the parties have renounced probation, or which raise no question of disputed fact, are enrolled and discussed in the PROCEDURE ROLL (*q.v.*). The Lord Ordinary's clerk puts out eight cases weekly for debate in the procedure roll, it being competent to put out additional cases during the week, provided they appear in the roll two days before they are called (A. S. 15 July 1865, s. 7). The roll is kept by the Lord Ordinary's clerk, and he must be supplied by the pursuer's agent with two copies of the record within four days from the interlocutor closing it (A. S. 2 November 1872, s. 5).

The debate rolls of the Inner House are known as the Short and

Summar Rolls respectively. The former is the ordinary roll of the Division: the latter contains such causes as are entitled to more than ordinary despatch, *e.g.* Bill Chamber causes and reclaiming notes against interloutory judgments.

The rules for the attendance of counsel at debates in the Outer House, and the excuses for absence which will be accepted, are contained in the A. S. 15 July 1865, and 2 Nov. 1872. In the Inner House the rolls are called in regular order, and counsel must attend when a case is called, as an excuse for not appearing will seldom be taken.

In Sheriff Court procedure the term "debate roll" is still employed. It corresponds to the procedure roll in the Court of Session, being used for the discussion of preliminary pleas, or questions of law where the facts are not in dispute, or questions as to the nature of the proof to be allowed when the facts are disputed. (See next Article.)

**Debate (Sheriff Court).**—(a) Where the record has been closed and a proof allowed, the Sheriff hears the parties or their procurators immediately after such proof has been led, unless one adjournment has been allowed on cause shown, which adjournment must not exceed seven days (Sheriff Courts Act, 1876, s. 23). (b) Where there is no proof, the debate takes place on the closed record, the case being sent for that purpose to the Debate Roll, where a special date is ordered for the hearing, or, if not, it is enrolled by the Sheriff Clerk for the next Court day after the closing.

The debate is opened by the pursuer, unless the onus of proof or of making out his defence is on the defender. The defender replies, and, should he have introduced new matter, the pursuer is heard again, but only in reply to it. The necessity of a fourth speech should thus be avoided.

Should either party absent himself from the diet of debate, the Sheriff may proceed in his absence, and, unless a sufficient reason appear to the contrary, must pronounce decree as libelled or of absolvitor, as the case may require, with expenses (Sheriff Courts Act, 1876, s. 20). Formerly, decree was given by default, but it seems preferable to give judgment on the merits, having heard the party who is present (see *Kennedy*, 1825, 4 S. (O. E.) 125; *Forrester*, 1829, 8 S. 266; *Dove Wilson, Practice*, p. 180).

If both parties fail to attend, the Sheriff, unless there be sufficient reason to the contrary, dismisses the action (Sheriff Courts Act, 1876, s. 20).

Where a case is argued on appeal before the Sheriff Principal, it may be either by oral debate, or by reclaiming petition and answers. Argument may, however, be dispensed with of consent (39 & 40 Vict. c. 70, s. 28 (1) (2)).

**Debating Societies.** — Debating societies of persons bound together by an oath of secrecy were struck at by the Acts 36 Geo. III. c. 7; 37 Geo. III. c. 123; 39 Geo. III. c. 79; and 52 Geo. III. c. 104, as subversive of political institutions. These Acts were for the most part repealed by 32 & 33 Vict. c. 24. See SEDITION.

## Debentures and Debenture Stock.

### DEBENTURES.

*Meaning.*—Debenture is a modern legal term in the law of Scotland, and means primarily a personal obligation for repayment of a loan (Lord



President Inglis in *Clark*, 1882, 9 R. 1017, 1023). In England it has been described by Chitty, L. J., as a document which either creates a debt or acknowledges it (*Levy*, 1887, 37 C. D. 260, 264).

*Mortgage Debentures.*—Debentures may give security over property or assets of the obligant, and so become mortgage debentures. But this is not a necessary feature of a debenture; and if it takes that form, the security, to be effectual, must be validly constituted according to the law of the country where the security subjects are situated.

*Under Companies Clauses Acts.*—The Companies Clauses (Scotland) Act, 1845 (8 Vict. c. 17, ss. 40–58), deals with the borrowing of money by companies subject to its provisions on “mortgage” or “bond,” of which it gives forms (Schedules C and D). The “bond” is just a debenture, though the word is not used, under the common seal of the company, duly stamped, and stating the consideration (s. 43). The obligees in such bonds are entitled to be paid out of the tolls or other property or effects of the company, without any preference *inter se* (s. 47); and no preference over other creditors is given. The “mortgage deed,” on the other hand, assigns to the creditor the undertaking of the company, future calls, etc., and in general the whole estate of the company, to be held until the debt and interest be paid, and it is declared that “every such mortgage deed shall have the full effect of an assignation in security duly completed” (s. 43). This creates a valid statutory security over the company’s undertaking, and ss. 56 and 57 provide for making it effectual by the appointment of a judicial factor to enforce payment of arrears of principal and interest, his duty being to receive the surplus proceeds of the company (*Broad*, 1888, 15 R. 641). A similar remedy is given in respect to debenture stock by the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118). But by the Railway Companies Act, 1867 (30 & 31 Vict. c. 126), which protects the rolling stock and plant of railways from the diligence of creditors, a fuller remedy is provided by the appointment of a judicial factor, “on the undertaking of the company,” who is invested with the whole charge and management thereof, which he is to retain, till from its income, and after paying working expenses, etc., he can pay the creditors according to their rights and priorities. He will then surrender the administration to the company and be discharged. But a judicial factor requires the authority of the Court to apply to Parliament, and an Act of Parliament to enable him to sell the undertaking. (See *Girvan and Portpatrick Ry. Co.*, 1881–82, 8 R. 669, 1003; 9 R. 253, 510, 854; see also *Gardner*, 1867, 2 Ch. 201, per L. J. Cairns, 217.)

*Under Companies Acts, 1862–1890.*—The Companies Acts do not deal with the subject of debentures; but the Act of 1862, s. 43, requires companies to keep a register of mortgages, and charges specifically affecting their property.

Ordinary trading companies, whose regulations are silent on the subject of borrowing, have an implied power to borrow for the purposes of the business of the company; but the power may be expressly limited, and many companies have no implied power to borrow (Lindley on *Company Law*, pp. 186–196). Companies having express or implied power may borrow by issuing debentures, and it is thought also debenture stock; but it is usual to have special power in the articles to issue debenture stock. (See *Palmer’s Precedents*, 6th ed., pp. 640–642.)

Debentures are generally issued in blocks, each separate debenture bearing to be one of the series, all repayable at the same date, and ranking *pari passu inter se*. If not payable at the same date, they will be payable

as they fall due, and thus those of shorter date will have a preference. But there may be a provision that failure to meet any debenture of the series when due will accelerate liability on all. And if liquidation supervenes, present and future debts will be ranked as in bankruptcy (Companies Act, 1886, s. 4).

Debentures may be made payable to a person named, his heirs, executors, or assignees, or to a person named or to his order, or to a person named or other the registered holder, or to a person named or bearer, or simply to bearer. Notwithstanding the earlier cases of *Borill* (1856, 3 Macq. 1), and *Commercial Bank* (1859, 21 D. 864), as to iron warrants, and *Natal Investment Co.* (1868, 3 Ch. 355), as to debentures to bearer, it is now decided that such debentures, whether home or foreign, are negotiable instruments by the law merchant, and pass by delivery free from the equities between the original parties (*Goodwin*, 1875, 10 Exch. 76 and 337, and 1 App. Cas. 476; *Simmons* [1891], 1 Ch. 270, [1892], App. Cas. 201; *Venables* [1892], 3 Ch. 527; *Bentinck* [1893], 2 Ch. 120). Debentures to bearer, which purport in express terms to be negotiable, will, in the hands of a holder, *bonâ fide* and for value, be supported on the ground of bar or estoppel. (See *Ld. Cairns'* judgment in *Goodwin*, *supra*.)

Debentures without security, or where the security is invalidly constituted, rank with the ordinary trade debts of the company (*Clark*, 1882, 9 R. 1017.)

When security is given, it is generally effected by a conveyance in appropriate form of the subject of the security to trustees, to hold, and, when necessary, to administer and realise. If the subject conveyed be heritage or long leases, registration in the Sasines Register is required to complete the security; if obligations, intimation is necessary; if uncalled capital, intimation to the shareholders; if ordinary leases, possession must follow; if moveables, delivery must be got; and if ships, registration in the Shipping Register is necessary. A floating security over the undertaking or the property or assets in Scotland of a company registered in Scotland is ineffectual. But a floating security is valid according to the law of England. If the company be English, but the property situated in Scotland, and again, if the company be Scotch, but the property in England, *Quid juris?* It is thought that the *lex rei sitæ* would rule, and the security would be ineffectual in the former case, but effectual in the latter. (See *Queenstand &c. Co.* [1891], 1 Ch. 536, [1892], 1 Ch. 219; 15 R. 935.)

In the trust deed for debenture holders it is generally provided that, notwithstanding the conveyance of the security subjects to the trustees, the company shall continue in the management of its business and property, but may be superseded on the occurrence of certain events, when the security shall become enforceable, *e.g.* the company failing to pay interest or principal within a certain time, a winding-up resolution or order, or the breach of any of the covenants or conditions of the trust deed. Thereupon the trustees are authorised to enter into possession of the premises, and also of the stock and other moveable property thereon, with power to sell and dispose thereof, or to carry on the business, etc. etc. If possession of the moveables be not obtained, the preferable security will to that extent be defeated, the right of the trustees to get, and the obligation of the company to give possession being simply a personal obligation ranking with others when a liquidation supervenes (*Clark*, 1882, *supra*, p. 1025). If possession be obtained, and a winding-up or supervision order be pronounced within sixty days after, questions may arise as to the debenture holders' preference; but it is thought that it would be effectual, seeing that by the statutes

after mentioned it is only diligences that are equalised or cut down, and, in the case supposed, possession would be obtained under an obligation to give it, and without using diligence. (See Companies Act, 1886, s. 3; *Althoe Hydro. Co.*, 1886, 13 R. 818.) It is also to be observed that, though a public company cannot be sequestrated (*Dunblane Hydro. Co.*, 1884, 12 R. 328), it may be made notour bankrupt, to the effect of equalising diligences in terms of the Bankrupt Act, 1856, ss. 4, 8, and 12 (*Clark*, 1884, 12 R. 347). But as a company cannot be made notour bankrupt under the Act, 1696, c. 5 (*Grant*, 1747, Mor. 1210), the clause in that Act annulling voluntary alienations within sixty days of bankruptcy do not seem to apply.

#### DEBENTURE STOCK.

Debenture stock issued under the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118, ss. 22-35), differs essentially from debenture stock of companies registered under the Companies Act, 1862.

*Under Companies Clauses Acts.*—Debenture stock of companies incorporated under the Companies Clauses Acts is declared by the above Act, s. 23, to be “a charge upon the undertaking of the company prior to all shares or stock of the company,”—in fact, a pre-preference stock, giving right to interest as a perpetual annuity payable out of the concern, but no right to payment of principal. It is not a debt, but capital stock transferable like other stocks, and of the nature of personal property. “The fixed and perpetual preferential interest” has priority over all dividends or interest on shares of the company, whether ordinary, preference, or guaranteed. The holder’s remedy, if default be made in paying interest, is to apply for the appointment of a judicial factor, whose duty it is to get in the net earnings of the company, pay the arrears of interest, and account to the company for any balance, before obtaining his discharge (*Altree*, 1878, 9 C. D. 337). Arrears of interest may also be sued for in any competent Court (Act, 1863, s. 27), and, on decree being got, proceedings may, in the case of a railway company, be taken to have a judicial factor appointed “on the undertaking” under the Railway Companies Act, 1867 (30 & 31 Vict. c. 126), before referred to.

*Under the Companies Acts 1862-1890.*—Debenture stock is a loan by a multitude of lenders (Lindley on *Company Law*, p. 195), whose title consists of a certificate by the company that they hold specified portions thereof under provisions as to periodical payment of interest and repayment of principal; and whose interests are intrusted to trustees, who generally hold subjects conveyed by the company in security, and are empowered and directed, on default in payment of interest, or, on a supervening liquidation, to enter into possession, administer the property, carry on the business, and realise the estate for the benefit of the debenture stock holders. Debenture stock is transferable, and a register is kept by the company.

*Payment of Principal.*—Debenture stock may be payable or redeemable either at a specified date, or on the expiry of a certain number of years, or on the expiry of a specified notice in writing, which may follow upon stipulated drawings, or in the event of interest being for a specified time in arrear, or in the event of a winding up. If no period be stipulated, the debenture stock being styled “perpetual,” the loan will be payable on liquidation, or, if the trustees have taken possession, in the due course of their administration.

*VARIOUS CLAUSES.*—Trust deeds for debenture holders and debenture stock holders contain numerous executory provisions, including powers to the holders to convene meetings and give instructions, within certain limits, to the trustees. Powers are also sometimes given to modify the rights of

holders, a majority binding the minority; and, under the Companies Arrangement Act, 1870, they may be deprived of their security by the vote of the requisite majority, if sanctioned by the Court (*Gillies* [1893], 20 R. 1119.) There is also, generally, a very ample clause of indemnity in favour of the trustees, but, subject thereto, they are liable for loss arising from breach or neglect of duty or malversation in office. The case of *Wilson* (1894, 2 S. L. T. No. 347) is an illustration of the enforcement of such liability. The judgment of the Lord Ordinary (Stormonth Darling) was reclaimed, but the case was compromised.

**PROSPECTUS.**—Directors, promoters, and others issuing prospectuses or notices inviting subscription to, *inter alia*, debentures and debenture stock, are liable, under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), to compensate persons subscribing on the faith of such prospectuses or notices as contain "untrue statements" as therein defined; and, apart from the statute, a promoter is liable in damages at common law for false and fraudulent representations which induce persons to take debentures or debenture stock in a company (*Dunnett*, 1885, 12 R. 400). The case failed on proof (15 R. 131). The constructive fraud created by the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38, does not apply to prospectuses or notices inviting subscription to debentures or debenture stock.

**STAMPS.**—Under the Stamp Act, 1891 (54 & 55 Vict. c. 39), the stamp on each debenture is at the rate of 2s. 6d. per £100. See Schedule, *vide* "Mortgage," etc. (1). The stamp on debenture stock is paid on the whole issue at once at the same rate, and is impressed on the deed, or, if more than one, the principal deed creating the stock, the other or subsidiary deed bearing a 10s. deed stamp. When afterwards additional security is given, or security substituted, a stamp duty at the rate of 6d. per £100 is chargeable. See Schedule, *supra* (2). Certificates of debenture stock which have paid the above mortgage stamp require no stamp.

See JOINT-STOCK COMPANY.

**Debita fundi.**—*Debita fundi* are debts attaching to the soil, such as feu-duties and proper casualties of superiority, which possess that character *ex lege*: and taxed compositions payable to superiors, and debts or money burdens heritably secured, including ground-annuals, which acquire the character *ex contractu*. These feu-duties, debts, and others form a lien over the lands, and the superior or creditor is entitled to recover them by an action of poinding of the ground. A superior or creditor, in order to have a good title to sue an action of poinding of the ground, must have a real right; thus a superior who has parted with his right cannot poind the ground for arrears of feu-duty (*Scot. Her. Co.*, 1885, 12 R. 550). See POINDING OF THE GROUND.

The following are the chief *debita fundi*:—

1. **FEU-DUTY.**—The *reddendo*, or annual return by a vassal to his superior in feu-holdings, consisting of money, produce, or services. It is *inter naturalia* of the feu, and does not require to enter the record. In addition to its being *debitum fundi*, the vassal was personally liable for it until a new vassal entered (*Hislop*, 1863, 1 M. 535); and he is still so liable until a new vassal has been impliedly entered, and notice of change of ownership has been given in terms of the Conveyancing Act, 1874, s. 4, and subs. 2. The superior has also the remedy of the irritancy *ob non solutum canonem*, but not that of an action of maills and duties (*Prudential Assurance Co.*, 1884, 11 R. 871). See MAILLS AND DUTIES. Feu-duties do not bear interest, by

law, until a judicial demand for payment, but after such a demand interest runs *ex mora* (*Tweeddale*, 1842, 4 D. 862): and where payable out of a consigned fund, bank interest will be due from the date of consignment (*Pollock*, 1862, 24 D. 372). Interest is now invariably stipulated for under the feu-rights. Arrears of feu-duties are only extinguished, year by year, by the long prescription. Arrears are not claimable after a decree of declarator of irritancy *ob non solutum canonem* (*Mays of Edinburgh*, 1834, 12 S. 593). The delivery of a charter by progress, without reservation of by-past feu-duties, formerly implied a discharge of these (*Tailors of Glasgow*, 1851, 13 D. 1073), and the same result would probably now follow the granting of an unqualified receipt for relief duty or composition to a vassal impliedly entered under the Conveyancing Act, 1874.

Examples of services stipulated for will be found in *Young*, 1693, *Argyle*, 1762, and *Munro*, 1763, Mor. 13071, 14495, 14497. Services and carriages must be exacted within the year (*Young, supra*), but payments in kind may be exacted either in kind or at the market prices of the respective years in which they fell due (*Hamilton*, 1835, 14 S. 162; affd. 1837, 2 S. & M.L. 586), and are only extinguished by the long prescription. As to the commutation of carriages and services, see the Conveyancing Act, 1874, ss. 20 and 21.

In feus granted after the commencement of the said Act (1 Oct. 1874) the annual feu-duty must be of fixed amount or quantity (*e.g.* of grain), and the same rule applies to any periodical addition to or reduction of it (s. 23). See SUPERIORITY, etc.

2. *PROPER CASUALTIES OF SUPERIORITY*, viz. (a) *Relief Duty*, and, (b) before the commencement of the Conveyancing Act, 1874, *Non-Entry Duties*.

(a) *Relief Duty*:—The entry money exigible by the superior from an heir on his succession in feu and blench holdings, viz., one year's feu or blench duty over and above the ordinary annual feu-duty. It was not exigible in burgage-holdings. The said Act (s. 23) abolished this and other casualties in feus granted after the commencement of the Act, and made provision (s. 24) for the case of feus contracted for previous to the passing of the Act, and (s. 15) for the redemption or conversion of all casualties. Casualties of relief and untaxed composition are still exigible in feu-rights entered into prior to the Act, unless otherwise stipulated in the feu-right, or unless redeemed, converted, or discharged.

(b) *Non-Entry Duties* were those to which the superior was entitled where the heir or singular successor of the last-entered vassal failed to renew the investiture. Before citation in a declarator of non-entry, the superior was entitled in proper blench-holdings to the retoured duties, or, where there was no retour, the old valued rent of the lands; in lands held blench in place of ward, to one per cent. on the old valued rent; and in feu-holdings, the feu-duty (nothing more). After citation the full rents fell to him as interim proprietor. The implied entry with the superior under sec. 4, subs. 2, of the 1874 Act has abolished this casualty, and the declarator of non-entry has been superseded (subs. 4) by an action of declarator and for payment of a casualty, a decree in which has the effect of a decree of declarator of non-entry, but ceases to have this effect on payment of the casualty, and expenses (if any) contained in the decree. Such payment, however, does not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree (the opinion has been expressed that this is limited to the rents uplifted or intromitted with, Begg's *Univ.* p. 321), nor to any feu-duties or arrears thereof.

3. *TAXED COMPOSITION*.—Erskine (ii. 5. 2) states the doctrine broadly, that the feu-duty and all other rights of superiority, where the superior is

not in possession of the lands themselves, are *debita fundi* or real burdens affecting the fee, and that an action for pointing the ground lies at the superior's instance for payment of them. As regards the composition of a year's free rent payable on the entry of singular successors, an opposite view has been maintained, namely, that it is not a proper casualty of superiority, and therefore not payable out of the lands, or a real burden on these (*Stirling*, 1842, 4 D. 684 (715); *affd.* 1844, 3 Bell's App. 128). A taxed composition payable at regular intervals is, however, undoubtedly *debitum fundi*; and it has been held by a majority of the Court that a taxed composition, payable on the death of a vassal and the entry of a singular successor, being a reserved right of the superior and a condition of the grant, is so (*Morrison's Trs.*, 1878, 5 R. 800). See SUPERIORITY.

4. *DEBTS OR MONEY BURDENS HERITABLY SECURED*, consisting of (a) *Real Money Burdens*, (b) *Sums secured by Bond and Disposition in Security*, and (c) *Ground-Annuals*.

(a) *Real Money Burdens* may be created either by reservation or by constitution. The requisites to their proper creation are: (1) the creditor must be named or pointed out; (2) the sum must be specific; (3) the burden must be imposed on the lands; (4) it must appear in the dispositive clause; and (5) it must enter and be kept up in the record. As already indicated, the creditor has the right of pointing the ground; but he cannot enter into possession, and has no title to sue an action of mailles and duties until he has led an adjudication. See BURDENS.

(b) *Sums secured by Bond and Disposition in Security*.—This is the chief form of security for money advanced, and of the burden by constitution. The principal requisites are: (1) that the obligation must be definite in the creditor and the amount; (2) that the lands are disposed in appropriate form in security; (3) that the bond is duly recorded in the appropriate Register of Sasines, or that infeftment has followed thereon; and (4) that the amount has been advanced prior to recording or infeftment. The statutory form of bond is given in the Titles Act of 1868, Sched. F F, and sec. 119. As a superior cannot recover his feu-duties by action of mailles and duties, so a creditor in a heritable security over a superiority has no title to sue an action of mailles and duties against his debtor's vassal (*Nelson's Trs.*, 1896, 23 R. 650). See BOND AND DISPOSITION IN SECURITY. The form of security for money to be advanced is: (a) the cash-credit bond (see BOND FOR CASH CREDIT) limited to a definite sum specified in the bond and three years' interest at five per cent. (19 & 20 Vict. c. 91, s. 7; *Morton*, 1828, 7 S. 172; *affd.* 1834, 4 W. & S. 379); or (b) an *Ex facie* ABSOLUTE DISPOSITION (*q.v.*). A debt secured by the latter is not *debitum fundi* in the sense here used, and the creditor cannot proceed by pointing of the ground (*Scot. Her. Sec. Co.*, 1876, 3 R. 333). A loan secured by bond and assignation in security of a long lease recorded in the Register of Sasines, under the Registration of Leases Act, 1857, is not *debitum fundi*, and does not warrant a pointing of the ground (*Luke*, 1896, 23 R. 634).

(c) *Ground-Annuals*.—These are annuities (chiefly perpetual, but sometimes redeemable) from lands, and are or were usually resorted to (1) where subinfeudation was prohibited; (2) in burgage property which, previous to the Conveyancing Act of 1874 (s. 25), could not be feued by the proprietors, as distinguished from the magistrates; and (3) in connection with building speculations. Ground-annuals are constituted (1) by reservation—that is, by disposing the property subject to a reserved real burden; most frequently, however, (2) by contract of ground-annual containing, on the one hand, a disposition to the purchaser, and, on the other, an obligation to pay

the ground-annual, and a disposition of the same furth of the subjects, and of the subjects themselves in security; and also (3) occasionally by bond for a ground-annual and disposition in security. Generally, the rules above indicated apply to these several modes of constitution. The title is completed, in the case of constitution by reservation, by the infefment of the disponee: in the case of the contract, by the recording of that deed, with two warrants of registration thereon: and, in the case of the bond, by recording it on behalf of the grantee. The distinctions between a feu-duty and a ground-annual are: (1) that the latter must enter and be kept up in the record as a real burden; (2) that, apart from stipulation, the personal obligation originally undertaken will not transmit against a singular successor (*Gardyne*, 1853, (H. L.) 1 Macq. 358; *Marshall's Tr.*, 1888, 15 R. 762); and (3) a ground-annual secured by disposition in security may be recovered by action of mails and duties. A proprietor of a ground-annual is entitled, after his debtor's sequestration, to point the ground for the current half-year's "interest on the debt," and one year's arrears under sec. 118 of the Bankruptcy Act, 1856 (*Bell's Trs.*, 1896, 23 R. 650). See GROUND-ANNUAL.

In case of a competition, feu-duties and casualties rank preferably, and those *debita fundi* arising *ex contractu* rank according to the dates of the registration of the infefments. A right of superiority is a permanent heritable estate. The other *debita fundi* are transmitted and extinguished in the same manner as heritable securities, and, with the exception of ground-annuals, are (unless otherwise destined) moveable as regards succession (Titles Act, 1868, s. 117).

*Annuities* heritably secured, and *Annual-rents* after infefment, are *debita fundi*.

*SUCCESSION DUTY* may also be looked upon in a sense as *debitum fundi*, as the Act of 1853 (16 & 17 Vict. c. 51), s. 42, declares it to be a first charge on the interest of the successor in the lands on account of which it is payable.

*BURDENS ON LAND WHICH ARE NOT DEBITA FUNDI*.—Some of these have been noticed, and the following may be added: Teinds are *debita fructum* merely, and stipend is a burden on the teinds; land-tax is not *debitum fundi* (see specially, as to land-tax within burgh, *Lanfrew*, 1861, 23 D. 505); nor do parochial, ecclesiastical, or public burdens or assessments bear that character. See PUBLIC BURDENS.

### **Debtor, Deceased** (*Winding-up of Estate by Judicial Factor*).—

Under the Bankruptcy Act, 1856, the estate of a deceased debtor, whether solvent or insolvent, testate or intestate, may be wound up by means of a judicial factor (19 & 20 Vict. c. 79, s. 164; see *Alexander*, 1862, 24 D. 1334; *Masterton*, 1887, 14 R. 712). This course, however, is competent only where the deceased has left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting (s. 164). The right to apply for the appointment of a factor is competent to one or more creditors of the deceased, to the amount of £100, or to persons having an interest in the succession of the deceased (*ib.*). It is not imperative on the Court to make the appointment; and where the executor or heir of the deceased is willing to make up a title and administer the estate, the Court will exercise a discretion (*Masterton, supra*). It is competent to the Court to recall an appointment upon such parties offering to administer, should it appear proper to do so (*ib.*); but the Court refused to take this step where the interests of creditors appeared to call for the continuance of the factory (*ib.*).

• The application is by summary petition presented to the Junior Lord Ordinary, or the Lord Ordinary on the Bills during vacation (see. 164; 20 & 21 Vict. c. 56, s. 4 (4)). The procedure is regulated by the Act of Sederunt of 25 Nov. 1857, which also contains detailed provisions regulating the conduct of the factor. The petition must be in the form provided by Schedule No. I. of the Act of Sederunt. It is printed and boxed in ordinary form, and also boxed to the Accountant of Court, and is intimated on the walls and in the Minute Book in common form. It must also be advertised in the *Gazette* according to the form in Schedule No. II. of the Act of Sederunt, and served on such of the successors of the deceased named in the petition as are not parties to the application (A. of S. ss. 1, 2). Petitioning creditors must produce evidence of their debts (see form of petition in Schedule No. I. to A. of S.). The nomination of the factor is a matter for the discretion of the Court, and the nominee of the petitioners may or may not be appointed (*Macfarlane*, 1857, 19 D. 656). Only such powers will be granted as the Statute authorises, and further powers must be the subject of a special application (*ib.*).

The judicial factor manages the estate, recovers debts due to it, realises the moveable effects by public or private sale as may be most expedient, disposes of the heritable estate by public sale or private bargain, according to such directions as the Court, on the report of the Accountant of Court, may give, and applies the free proceeds, after defraying all expenses, in payment of the claims of creditors according to their several rights and preferences, conformably to a state of funds and scheme of division prepared by him, and considered and approved of by the Court on a report by the Accountant (19 & 20 Vict. c. 79 s. 164). Thereafter he accounts for the residue, if any, to the parties having a right to the deceased's succession (*ib.*).

The Accountant of Court annually examines and audits the proceedings, intromissions, and accounts of the factor, which must be duly transmitted for that purpose, and he reports to the Court thereon, from time to time, as he deems expedient; and he exercises generally the like powers and discharges the like duties with regard to the factor as he is empowered and required to exercise and discharge with regard to a trustee in sequestration, but subject always to the control of the Lord Ordinary on the Bills, or the Court (*ib.*).

The Court of Session has full power to regulate by Act of Sederunt the caution to be found by the factor, the mode in which he must proceed in realising and dividing the fund and otherwise in the discharge of his duties, and any other matter which may be deemed necessary (*ib.* s. 165). Under this power the Court passed an Act of Sederunt of 25 Nov. 1857, which forms the subsisting rule for the conduct of this class of factory.

The judicial factor must, within three weeks from his appointment, and before obtaining extract or acting in the factory, find caution for his intromissions; and on the death or insolvency of his cautioner he must find caution anew (A. of S. 1857, ss. 6, 7).

On extracting his appointment the factor must immediately proceed to inquire into and ascertain the position of the estate, and is empowered to enter into immediate possession and make up title thereto (*ib.* s. 8).

Within eight days after extracting his appointment, the factor publishes a notice in the *Edinburgh Gazette*, and in such newspapers as appear proper, calling on creditors and others interested to lodge with him their claims and vouchers (*ib.* s. 9, and Schedule No. III.).

The factor thereafter examines the claims of creditors in order to ascertain



whether they are justly due, and may call on creditors to produce further evidence, or to constitute their claims by decree (*ib. s. 10*).

Within six months from the date of extracting his appointment, the factor must lodge with the Accountant of Court a full inventory of the estate, and produce or exhibit all documents of importance, and at the same time report a state of the debts appearing to be due, distinguishing creditors' claims from those relating to the succession, and must append a vidimus of the estate, estimating the probable value thereof when realised, and the amount of claims of creditors and of other persons interested in the succession; and the inventory when adjusted and signed, as after mentioned, with the state of debt and vidimus, is retained by the Accountant, and all creditors or others interested are entitled to access thereto (*ib. s. 11*).

On receipt of the inventory the Accountant examines the same, calling for all necessary documents, so as to settle the inventory as a clear rule of charge against the factor; and any additional property or claims emerging in the future must be reported forthwith to the Accountant, and added to the inventory. The inventory, when approved and adjusted, is signed by the Accountant and factor, and the Accountant then fixes within what period the factor shall prepare a state of funds and scheme of division to be considered and approved by the Court. The period so fixed may be prorogated by the Accountant (*ib. s. 13*).

When the factor desires special powers from the Court, he must submit the proposal by note to the Accountant, who, after inquiry, reports his opinion in writing, which must be produced with the application to the Court (*ib. s. 14*).

The state of funds and scheme of division are, along with all necessary documents and information, laid before the Accountant, who makes a written report thereon to be submitted to the Court (*ib. s. 15*). The factor must immediately lodge the report in court along with the state of funds and scheme of division, and intimate the lodging thereof by post to each claimant, stating the amount for which the creditor has been ranked, and whether his claim is to be paid in full or by dividend, and the amount thereof; and in the case of claims being rejected, stating that fact; and he must also insert a notice in the *Gazette* (*ib. s. 16*, and Schedule No. IV.); and if any persons not claiming are stated in the original petition to the Court, or in the books, etc., of the deceased, to be creditors of or interested in the estate, or if the factor have reason to know of such persons, he must notify them by post that no dividend is allotted to them (*ib.*).

Creditors and others interested in the succession are entitled to examine the state of funds and scheme of division lodged in Court, and the claims and vouchers thereof; and if dissatisfied, may lodge a note of objections, signed by counsel, with the Clerk of Court within three weeks from the last date of the above-mentioned notices; and the state and scheme cannot be approved by the Court until the lapse of the three weeks (*ib. s. 17*). Objections are disposed of by the Court after hearing counsel and making all necessary inquiry; and if they are sustained to any extent, the state and scheme are altered accordingly (*ib. s. 18*).

When the scheme of division is adjusted, it is approved by the Court, and the factor pays or makes over the sums or subjects allocated therein to the respective parties (*ib. s. 19*).

A partial division may, with the approval of the Accountant, be made where compatible with safety to the interests of all concerned, after the lapse of six months from the death of deceased, sufficient funds being retained to meet debts which are future, or contingent, or under dispute

(*ib. s. 20*). The factor is entitled from the first of the funds, and without waiting the expiry of six months, to pay deathbed and funeral expenses, rents, taxes, and such servants' wages, as are privileged debts, and interest becoming due, or past due, to preferable creditors (*ib. s. 22*).

The factor must lodge all money coming into his hands in some of the banks in Scotland established by Act of Parliament or Royal Charter, in a separate account or on deposit, in his own name as judicial factor; and he must not keep more than £50 in his hands for more than ten days; and it is the duty of the Accountant to report to the Court any failure of the factor in this respect (*ib. s. 21*).

The factor's first account of charge and discharge of his intromissions falls to be lodged with the Accountant, for examination and audit, at such period as the Accountant fixes, when the inventory of the estate (see *supra*) has been lodged. Along with it must be lodged an account current, showing the money in the factor's hands from day to day; and similar accounts, accompanied by proper vouchers, must be lodged yearly, or oftener, and at such dates as the Accountant may direct (*ib. s. 23*). The Accountant, in auditing the accounts, fixes the factor's commission (*ib. s. 24*).

The factor may, where necessary, employ a law agent (other than his own partner), whose accounts are taxed by the Auditor of Court, with power to the Accountant to disallow, on grounds stated, any part thereof, subject to review by the Court on a note of objections by the factor, boxed and lodged within ten days of the Accountant's deliverance being intimated to the factor or his known agent (*ib. s. 25*).

Outlays by the Accountant in regard to special reports to the Court, by order or decree of the Court, form a charge against the estate, and must be paid by the factor, after audit by the Auditor of Court, unless the Court subject the factor personally in payment (*ib. s. 26*).

If the factor misconducts himself, or fails in the discharge of his duty, he is liable to forfeiture of his commission, and removal from office, and to payment of expenses, or to one or more of these penalties, as the Court may determine, besides being liable in reparation of any loss or damage arising from his misconduct or failure (*ib. s. 27*).

The factor obtains his discharge from the Court on a petition, with a report by the Accountant regarding his management and right to discharge. The petition must be intimated to the representatives of the deceased, and advertised by notice in the *Gazette* (*ib. s. 28*, and Schedule No. V.). On the lapse of fourteen days after the publication in the *Gazette*, the Court, after such inquiry as may be necessary, disposes of the petition; and if the Court grant the discharge, they order the bond of caution to be delivered up (*ib. s. 28*).

All applications to the Court under the Act of Sederunt are addressed to the Lords of Council and Session, but are brought before, dealt with, and disposed of by the Junior Lord Ordinary, or the Lord Ordinary on the Bills in vacation, subject to the review of the Inner House, in conformity with sec. 4 of 20 & 21 Vict. c. 56 (*ib. s. 29*).

**Debtors (Scotland) Act, 1880.**—The leading changes in the law introduced by this Statute (43 & 44 Vict. c. 34), which came into operation on 1st January 1881, were these:—

1. The abolition of imprisonment for debt in the case of all civil debtors, excepting debtors for taxes, fines, or penalties due to Her Majesty, and rates and assessment (s. 4). Sums decerned for aliment were also ex-

cepted by the Act, but were put on a different footing by the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42). The Act does not affect the apprehension or imprisonment of any person under a warrant against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum prestandum*.

2. The creation of a new mode of constituting notour bankruptcy in cases where, by the Act, imprisonment was rendered incompetent, namely, by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made.

3. The adaptation of the process of *cessio bonorum* to the changed state of the law operated by the abolition of imprisonment for debt by giving to it the character of a minor process for the distribution of bankrupt debtors' estates capable of being initiated either (1) by any debtor who is notour bankrupt, or (2) by any creditor of a debtor who is notour bankrupt, and by regulating the procedure under such petitions (ss. 7, 8, 9, 11).

4. The definition of a variety of offences on the part of debtors under sequestration or cessio rendering them liable on conviction before the Court of Justiciary or before a Sheriff and jury to imprisonment for any time not exceeding two years, or by a Sheriff without a jury for any time not exceeding sixty days with or without hard labour (s. 13). The Act also renders liable to imprisonment for any period not exceeding one year, with or without hard labour, any creditor who wilfully makes any false claim, or makes or tenders any proof, affidavit, declaration, or statement of account in sequestration or cessio which is untrue in any material particular (s. 14). [See BANKRUPTCY; CESSIO; SEQUESTRATION; IMPRISONMENT FOR DEBT.]

**Debts Recovery Court (Sheriff Court).—***What Debts may be sued.*—Procedure in the Debts Recovery Court is regulated by the Debts Recovery (Scotland) Act, 1867, 30 & 31 Vict. c. 96, and is an extension, with modifications, of the procedure in the Small Debt Court, as contained in the Small Debt Act, 1837, to the case of debts between the sums of £12 and £50, the value being determined by the highest sum for which decree can be given (per. Ld. Kinnear, in *Standard Shipowners' Mutual Association*, 1896, 23 R. 870). It is unaffected by anything contained in the Small Debt Amendment Act, 1889. The debts which can be sued in the Debts Recovery Court, in addition to being of this value, must be of the nature of "house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts" (Debts Recovery Act, s. 2). For the scope of these terms see Dickson on *Evidence*, ss. 476–487; Grierson's edition, p. 318 *et seq.*; Dove Wilson, *Sheriff Court Practice*, pp. 527, 528; *Sandus*, 1874, 2 R. (J. C.) 7; *Grant*, 1881, 9 R. 257; *Walker*, 1884, 21 S. L. R. 451; *Macgregor*, 1885, 1 S. L. R. v. 229; *Airlie*, 1886, 2 S. L. R. v. 127; *Raimes*, 1887, 3 S. L. R. v. 410.

Counter-claims must be of similar nature and value (*M'Kendrick*, 1870, 9 M. 283); and if these, or a claim in a multiplepinding, should not be so, it is in the Sheriff's discretion to remit the case to his Ordinary Roll (Act, s. 5).

*Adoption of Small Debt Act, 1837.*—The provisions of the Small Debt Act, 1837, with regard to the recovery of rents, arrestment of goods of defender, loosing of arrestments, rendering arrestments effectual, multiple-

pointings, compelling attendance of witnesses, payment by instalments of sums found due, enforcement of decrees in other counties, sufficiency of one witness, Circuit Courts, determination of jurisdiction by defender's domicile, neglect of duty by officials, non-exemption from jurisdiction of any person on the ground of privilege, and the limitation of fees by the Court—are, in so far as not inconsistent with its own provisions, adopted by the Debts Recovery Act; with this proviso, that they are to be read as if they expressly related only to actions of the nature and value competent in the Debts Recovery Court (*ib.* s. 5).

*Agents.*—Parties may appear personally, or by anybody *bonâ fide* employed by them in their usual business, or they may be represented by an agent (*ib.* s. 4).

*Summons.*—The proceedings commence by a summons similar to that in the Small Debt Court, with this exception that it does not contain and does not constitute a warrant to cite witnesses and havers (*ib.* s. 3).

*Decrees in Absence.*—Decrees in absence, and reponing against them, are ruled by the provisions of the Small Debt Act, 1837; except that, in the case of a pursuer, the time for reponing is extended from one to three months, and that the warrant for hearing, after reponing, contains no warrant to cite witnesses and havers (*ib.* ss. 6, 7).

*Diet of Hearing.*—At the diet of hearing mentioned in the summons, or, where there has been reponing, in the warrant for hearing, the Sheriff makes a note of parties' pleas; and if he considers the case to be of such a nature that it cannot with justice be tried by the summary procedure provided by the Act, he remits it to the ordinary Court, where it proceeds just as if it had commenced there; and thereafter any objection that it is not of the nature or value that would have made it competent in the Debts Recovery Court is too late. If he decides to go on with it in the Debts Recovery Court, he fixes a day of proof and grants warrant to cite witnesses and havers (*ib.* s. 8).

*Proof.*—The proof is conducted as in an ordinary action, except that no record of the evidence is kept, unless specially required by either party, which request must be made before any evidence has been led. The note of evidence is the same as in an ordinary action, and is taken either by the Sheriff or by a shorthand writer (*ib.* s. 9).

*Judgment.*—Where the evidence has been thus recorded, the Sheriff, in giving judgment, must set forth the findings in fact and in law on which he has proceeded (*ib.* s. 9); and though not expressly provided for, it would appear competent and expedient that he should do so even where there is no such record.

*Appeals.*—No form of review except that authorised by the Act, whether by suspension, reduction (*Robertson*, 1887, 14 R. 474), or appeal, is competent (*ib.* s. 17).

No appeal, either (*a*) in the Sheriff Court or (*b*) to the Court of Session, is competent where a note of the evidence as above has not been taken, in so far as the findings in fact are concerned, which in that case become final and conclusive (*ib.* s. 10; *Cumming*, 1868, 7 M. 156). Further, no appeal is competent until the final disposal of the case by the Sheriff (*Mitchell*, 1882, 20 S. L. R. 263); but when taken, it submits to review all the previous proceeding (*ib.* s. 10).

(*a*) *Appeal in the Sheriff Court.*—Subject to the above provisions, appeal may be taken from the Sheriff-Substitute to the Sheriff within eight days, or, if in Orkney or Shetland, sixteen days. The appeal submits no argument nor any additional plea (*Simpson*, 1881, 8 R. 469) to the Sheriff; but it may

have appended a note of the legal authorities. The Sheriff having considered the process, retransmits it to the Sheriff Clerk, with his interlocutor giving judgment, which, in the event of his altering the Sheriff-Substitute's decision, must set forth the findings in fact and in law on which he proceeds. He may, however, order the case to be reheard, and the evidence taken of new, or additional evidence taken, either before himself, the Sheriff-Substitute, or a qualified commissioner (*ib. s. 11*).

(*b*) *Appeal to Court of Session*.—Subject to the provisions already stated, there is an appeal to the Court of Session from the decision of the Sheriff, whether the case originated before him or came before him on appeal from the Sheriff-Substitute, but only where the value of the cause exceeds £25. There is no appeal direct from the Sheriff-Substitute to the Court of Session. Appeal must be taken within eight days, or sixteen days if in Orkney or Shetland, to either Division of the Court of Session. The Sheriff Clerk transmits the whole process, and within ten days of its being received in the Court of Session, or, if in vacation, before the third next sederunt day, the appellant must move the Division by written note, which must at the same time be intimated to the other party, to have the cause sent to the Summar Roll. If he fail to do so, the appeal is held to have fallen, and the judgment appealed against becomes final. On the motion being made, the Division makes such order as to printing as may be necessary. After debate it pronounces judgment, and either remits to the Sheriff to decern accordingly, or it pronounces a decree in the Court of Session. It may, however, remit back to the Sheriff to rehear and take evidence of new or additional evidence, and the decree on such rehearing takes the place of the one appealed against (*ib. ss. 12, 13, 14*). The judgment of the Court of Session is final, and cannot be reviewed by any Court (*ib. s. 12*).

*Extract and Diligence*.—These follow the rules of the Small Debt Court: but arrestments prescribe after three years (*ib. s. 5*), and poindings must be reported to the Sheriff Clerk, whether followed by a sale or not (*ib. s. 16*).

*Expenses*.—All fees exigible by agents or officials in the Debts Recovery Court (with the exception of those to shorthand writers,—as to whether agent or party is primarily liable for these, see *Moodie*, 1894, 2 S. L. T. 111,—witnesses, or commissioners, which the Sheriff may fix in his discretion) are fixed by the Act, s. 18, exclusive of actual and necessary outlay (*Stewart*, 1872, 2 C. 344). The Sheriff may, at common law, modify or refuse expenses (*Fraser*, 1867, 6 M. 170). Expenses in any appeal to the Court of Session are taxed and decerned for in common form (*ib. s. 18*).

*Special Actions*.—Furthecomings, multiplepoindings, and sequestrations, if of the necessary value, are competent, and the procedure in these is the same as in the Small Debt Court (*ib. s. 5*): but ejections, having been made competent in the Small Debt Court only by the Small Debt Amendment Act, 1889, are incompetent in the Debts Recovery Court.

Dove Wilson, *Practice*, 527–535.

**Decern—Decerniture** (*Court of Session*).—A decerniture is giving decree. To decern is to decree. Without the word decern an interlocutor cannot be extracted. The words may be added *ex intervallo* (*Laurie*, 1833, 11 S. 246).

(*Sheriff Court*).—It is not necessary for extracts that the word “decerns” shall be contained in a “decree” in civil actions or proceedings in the Sheriff Court (Sheriff Courts (Scotland) Extracts Act, 1892, 55 & 56 Vict. c. 17, s. 4), a “decree” including any judgment,

deliverance, interloutor, act, order, finding or authority, which may be extracted (*ib.* s. 3). The provisions of this Act do not apply to the Small Debt or Debts Recovery Courts, summary ejections, commissary or executory proceedings, proceedings under the Summary Jurisdiction Acts, or with regard to service of heirs or completing titles (*ib.* s. 2). See EXTRACT; DECREE.

**Decimæ debentur parochio.**—The rule that tithes—called teinds in Scotland—are due to the parish, *i.e.* to provide religious ordinances in the parish from which they are drawn, has never been adopted or acted upon to the fullest extent in Scotland (Ersk. ii. 10. 11; Connell, i. 442–445; Buchanan, 88, 259 *et seq.*) In pre-Reformation times the titulars in vicarages were accustomed to pay a small portion of the teinds of the parish as stipend to a vicar or stipendiary, and to apply the remainder to their own use. Some of the churches also were assigned to bishops, and were called mensal churches, because they were appropriated to provide for the bishop's table; while others, assigned to the dean and other members of the Chapter in common, were called common churches. In parsonages or patronate parishes the patron generally arranged with a presentee for a limited stipend, and the remainder of the teinds fell to the patron. The Reformation brought with it serious difficulties in securing stipends out of the teinds of the parish. See ASSUMPTION OF THIRDS; also AUGMENTATION. Sometimes stipends, or portions thereof, were allocated upon the teinds of other parishes. It has been held that teinds in this position may be recovered by the parish minister, when required for his own stipend, on showing that free teinds exist in the parish from which they are proposed to be withdrawn, to make up for the loss (*St. Cuthbert's (North Leith case)*, 1802, Mor. 14834, and the later case of *Minister of Bonhill*, 1882, 10 R. 312). See as to dates from which reclaimed teinds are payable, Elliot, *Teind Court Procedure*, 78. See TEINDS.

**Decimæ garbales** were the teinds of growing crops, strictly limited in Scotland to the teind sheaves, which were uplifted from the fields, or otherwise contracted to be paid for in rental bolls or silver duties, before the system of valuations of teinds was introduced in the reign of King Charles I. In the submissions to His Majesty in 1628, which led to these valuations, wheat, bear (equivalent to barley), oats, pease, and rye are the only produce of the land mentioned as subject to teinds (Thomson's *Acts*, v. 189, 207). These teinds are sometimes called DECIMÆ RECTORIÆ (*q.v.*), as belonging to the rector or parson, and from the latter they again derive the designation, most commonly in use, of parsonage teinds. They are also sometimes called the great teinds, to distinguish them from the lesser teinds of minor products payable to the vicar, and they were by the canon law included in the list of predial teinds as distinguished from personal teinds, the fruit of personal labour. This last distinction was never of any importance in Scotland. Parsonage teinds had been restricted by usage.—[Ersk. ii. 10. 13: Forbes, 289; Connell, i. 75, 75.] See TEINDS.

**Decimæ inclusæ.**—See CUM DECIMIS INCLUSIS.

**Decimæ rectoriæ** were the teinds which belonged to the

rector or parson (see DECIMÆ GABEALES). Out of 940 parishes in Scotland at the period of the Reformation there were only 262 parsonages. The designation parsonage teinds has however been, and is still, applied to the great teinds in every teind-producing parish in Scotland, stipends having been awarded from the teinds "parsonage and vicarage," and augmentations thereof continue to be so awarded.—[Elliot, *Teind Court Procedure*, 4, 51.] See TEINDS.

**Decimæ vicariæ** were the lesser teinds belonging to the vicar, comprehending certain fruits not included under the parsonage or great teinds,—fish, the young of certain animals, eggs, milk, and other produce, as shown from the rentals of the religious houses (Keith, *Appendix*, 182-187; Buchanan, 53. 57). They were dependent on custom or local usage. Most of the vicarage teinds in Scotland have been lost from desuetude, and only such teinds as are included in valuations of teinds or in decrees of modification and locality of stipends are now available. Stipends are generally payable out of the teinds parsonage and vicarage, but sometimes specific vicarage teinds have been awarded. They are not paid in kind, but according to a use and wont conversion in money.—[Elliot, *Teind Court Procedure*, 74.] See TEINDS.

**Declaration by Prisoner.**—Where a person has been apprehended (*Keith*, 1875, 3 Coup. 125, 2 R. (J. C.) 27; *Thomson*, 1875, 3 Coup. 104) on a criminal charge, and the crime charged is considered to be too serious to be disposed of summarily, he is at once brought before the Sheriff or magistrate to be examined on declaration. If an accused person is not apprehended, a declaration is not necessary.

*Advice of Law Agent.*—An accused person is entitled, immediately upon arrest, to have intimation sent to any properly qualified law agent that his professional assistance is required; "and such law agent is entitled to have a private interview with the person accused before he is examined on declaration, and to be present at such examination" (50 & 51 Vict. c. 35, s. 17). Where the charge against the prisoner is of a serious nature, he ought to be informed by the magistrate, prior to his declaration being taken, of his rights under sec. 17 of the Act (*Goodall*, 1888, 2 White 1). The agent is not entitled to interfere with the examination, the statute providing that it shall be conducted according to the practice existing before the passing of the Act. The Sheriff or magistrate may delay the examination for a period not exceeding forty-eight hours from and after the time of apprehension, in order to allow time for the attendance of the law agent (s. 17). In most districts of Scotland, though not in all, the law agents for the poor do in practice attend examinations on declaration where their services are requested by the accused. But they are not obliged to do so (see *Ld. McLaren's* remarks in *Goodall*, 1888, 2 White 1, at p. 5).

*The Sheriff or Magistrate* may be either the judge before whom the accused was first brought, or another magistrate to whom he is remitted by the first. It is not necessary that the magistrate before whom the declaration is emitted should have power or jurisdiction to try the offence charged. A person who is not a magistrate cannot preside at a judicial examination (*Erskine*, 1818, Hume, ii. 327, note a; *Hughes*, 1811, and *Ronald and others*, 1817, Hume, ii. 329, note 1). A declaration may be emitted before an honorary Sheriff-Substitute, or a person acting temporarily and gratuitously as a

Sheriff-Substitute (*Mabon and Shillinglaw*, 1842, 1 Br. 201; Bell, *Notes*, 151). In this matter it is incompetent for a Sheriff-Clerk to act as Sheriff-Substitute by deputation (*Stewart*, 1857, 2 Irv. 614, 29 S. J. 344).

*Examination.*—The Sheriff or magistrate must be present during the examination, in order to protect the accused from unfair examination. A declaration emitted in the absence of the magistrate will not be admitted in evidence (*Davidson*, 1827; Hume, ii. 327, note a; *Macmillan*, 1858, 3 Irv. 213; Alison, ii. 560, 561; Macdonald, 265). In practice the questions are put by the Procurator-Fiscal. But the principle of the law is, that “when anyone is apprehended upon an accusation of crime and taken before a magistrate, he is himself at liberty to offer any explanation of the circumstances which he knows, or of those which are brought to his knowledge by the magistrate; and that the magistrate is not only entitled, but bound to give him an opportunity of offering an explanation, either generally, or upon any particular matters which the magistrate thinks require explanation . . . No questions should be put by the Procurator-Fiscal at any time before the magistrate; and when the prisoner intimates that he declines to answer further questions, none should be put by anyone” (per Ld. Young in *Brims*, 1887, 1 White 462).

The prisoner must be in his sound and sober senses. It is the duty of the magistrate to assure himself of his sanity and sobriety (Hume, ii. 80, 328; Alison, ii. 559, 560; *Elder*, 1827, Syme 92; *Connacher*, 1823, Shaw 108). If he is satisfied that the accused is insane, he must record the fact, and no examination will take place (*Robertson*, 1891, 3 White 6). He must inform the prisoner of the charge against him, and warn him that what he says may be used in evidence against him, and also that he may decline to answer any questions. “These solemnities are now so established, that their absence would probably invalidate the declaration, although formerly they were not held essential” (Macdonald, 267). The prisoner’s declaration must be voluntary. It must not be induced by threats or promises (Hume, ii. 328, 329, 335, and cases cited; Alison, ii. 561 *et seq.*; Macdonald, 266, 267, and cases cited). If the prisoner states that he declines to answer, this is taken down, and forms the declaration. It is not proper to interrogate him further (*Brims, ut supra*).

The declaration is written down. On the conclusion of the examination, it must be read over, and the prisoner’s amendments, if any, must be inserted (Hume, ii. 81, 330). The declaration is signed by the prisoner and the Sheriff or magistrate. If the accused is unable to write, or declines to sign the declaration, this must be stated in the declaration, and the document is signed by the magistrate in his presence (Hume, *ib.*; *Plenderleith or Dewar*, 1841, 2 Swin. 558; *French*, 1855, 2 Irv. 198). If during the examination any articles are shown to the prisoner, sealed labels are attached to them and signed by prisoner and magistrate as relative to the declaration. The declaration ought to be written by a neutral person, the Sheriff-Clerk or his depute, and not by the Procurator-Fiscal or any depute of his (*Kelly*, 1843, 1 Brown 543; *Galbraith*, 1860, 3 D. 52). It must be taken before two witnesses (Hume, ii. 81) who understand the language used by the prisoner (Burnett, 492, and cases there; Alison, ii. 570; *Mackenzie*, 1839, 2 Swin. 345). The witnesses must sign the declaration (Hume, *ib.*). The formal parts of a declaration may be either written or printed, or partly written and partly printed (Crim. Proc. Act, 1887, s. 69).

If the prisoner does not understand English, a sworn interpreter is employed (Alison, ii. 569, 570; *Campbell*, 1837, Bell, *Notes*, 243; *Mac-*



*kenzie*, 1839, 2 Swin. 241). Where the prisoner is deaf and dumb but can write, his declaration may be taken by means of a slate, a copy of what is written on the slate being then made, read over by him, and signed (*Smith*, 1841, 2 Swin. 547).

*Re-Examination.*—The prisoner may be re-examined on declaration. He may be so re-examined, even after commitment for trial (*Hume*, ii. 326), but not after the libel has been served (*ib.* 331). When he is re-examined, any previous declaration emitted by him must be read over to him.

It is no longer necessary to libel the declaration; but it must be entered in the list of productions to be used at the trial (*Crim. Proc. Act*, 1887, s. 19). The names of the witnesses to the declaration are not inserted in the list of witnesses for prosecution or defence (*ib.* ss. 35, 69). The declaration is received in evidence without being sworn to by witnesses (s. 69). It is, however, competent for the accused, before the declaration is read to the jury, "to adduce as witnesses the persons who were present when the declaration was emitted, and to examine them upon any matters regarding such declaration on which it would be competent to examine them according to the existing law and practice, and to move the Court to refuse to allow the declaration to be read on grounds appearing on the face of the declaration itself, or on the ground of what is disclosed in such evidence, or on both of these grounds; and where a person accused objects to the declaration, the prosecutor shall be entitled to examine any witnesses in regard thereto, whom the person accused may be entitled to examine as aforesaid" (*ib.*).

Only the prosecutor is entitled to put the declaration in evidence. The prisoner cannot insist on its being read (*Dickson on Evidence*, s. 337; *Potts*, 1842, 1 Broun 497). In practice, however, the prosecutor rarely refuses to allow the declaration to be read, if the accused desires it. The prosecutor cannot produce one of several declarations and withhold the others (*Dickson, ibid.*).

[*Dickson*, ss. 314 *et seq.*]

**Declaration, Dying.**—See DEPOSITION BY DECEASED PERSON.

**Declaration, Judicial.**—See EXAMINATION, JUDICIAL.

**Declarator.**—Declarator is one of those remedies, unknown in the law of England, in which the good sense and adaptation of the Scottish law to the occasions and business of life is distinguishable (*Bell, Com.* vol. i. p. 785). A declaratory action is one in which some right, either of property, of servitude, of status, or some other inferior right, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender (*Ersk.* iv. 1. 46; *Stair*, iv. 3. 47). Decree in a declarator proper confers no new right: it merely declares that an antecedent right was in the pursuer: it has therefore a retrospective quality going back to the date at which the right commenced: but this quality is not applicable to most of our declaratory decrees (*Ersk.* iv. 1. 46). Examples of simple declarators are: declarators of marriage, of expiry of the legal, of irritancy, of bastardy. A simple declarator, speaking generally, must be brought in the Court of Session. What is very common, however, is to conjoin declaratory with petitory or possessory conclusions, and such actions are competent in the Sheriff Court. Thus there may be an action

for "declarator, payment and damages," or "declarator, interdict and damages." See DECLARATOR (SHERIFF COURT).

*When simple Declarator competent.*—Declaratory actions are designed for the purpose of making clear that which is doubtful, and which it is necessary to make clear. They are not intended to establish truisms, nor for setting up a right which is not attacked (*Magistrates of Edinburgh*, 1863, 1 M. 887, per Ld. Neaves; *Heriot's Trust*, 1894, 2 S. L. T. 300; *Cook's Trs.*, 2 S. L. T. 322). Nor is a declarator of an abstract proposition, separate from and independent of any consequent right in the pursuers, or any practical object or purpose as to the meaning of a public Statute, competent (*Todd & Higginbotham*, 1854, 16 D. 794; *Lyle*, 1830, 9 S. 22; *Gifford*, 1829, 7 S. 854. The cases on the competency of a declarator are reviewed in *Tennent*, 1894, 31 S. L. R. 619). The pursuer must have an interest in the right sought to be declared. Again, the Court has refused to listen to a declarator of a right before the facts emerge on which the right depends (*Earl of Galloway*, 1838, 16 S. 1212; *Millar*, 1896, 4 S. L. T. 190). Wherever, in fact, the action is premature, the Court will dismiss it: where, for instance, certain parties asked the Court whether a will, if made, would be effectual, in view of certain provisions in a trust deed, the Court refused to deal with the question (*Harveys*, 1860, 22 D. 1310; *Fleming*, 1879, 6 R. 588). Wherever it is clear that a judgment, if pronounced, will not be *res judicata* against all persons who may become interested in the matter, the Court will refuse to deal with the case (*Harveys*, *supra*, p. 1326). Of recent years, however, the Court has taken a less strict view of what is premature; for instance, where a liferenter held an estate under a disposition which declared that he would forfeit it if he sold it, the Court held that he was entitled to raise *ab ante* a declarator of his right (*Chaplin's Trs.*, 1890, 18 R. 27; *Falconer Stewart*, 1892, 19 R. 630). So far back as 1846, a party, entitled to a postponed and contingent provision under a marriage contract, was found entitled to have his rights ascertained by declarator, the debtor in the obligation objecting to their validity (*Mackenzie's Trs.*, 1846, 8 D. 964). Where a right is *in spe*, declarator is the proper form of action, if an action is competent at all (*Provan*, 1840, 2 D. 298). A declarator of the rules of assessment applicable to particular subjects is competent (*Mackay's Manual*, p. 375; *Edinburgh and Glasgow Ry. Co.*, 1849, 12 D. 153; *Miller*, 1259, 21 D. 975). If a party brings an action of declarator, anticipatory of some exaction which is not threatened, the action will be thrown out as needless: the Court will say to the pursuer, "Wait till you are hurt, or till someone threatens to hurt you." The moment, however, a party is threatened with the exaction of a payment, he is entitled to bring his declarator. In the words of Ld. Young, "the only virtue of an action of declarator is that we may have our rights determined by anticipation" (*Hogg*, 1880, 7 R. 986). A general declarator of the meaning of an Act of Parliament is incompetent (*ib.*). Where, for instance, the conclusion was, "that the provisions and enactments in sec. 22 of 7 & 8 Geo. IV. c. 43, did not apply to certain manufactories erected prior to the passing of the said Act, although otherwise of the character and description therein specified," the Court threw out the action (*Todd & Higginbotham*, 1854, 16 D. 794; *Balfour*, 1842, 1 Bell's App. 163, per Ld. Campbell; *Stewart*, 1869, 8 M. 26); but, on the other hand, an action to declare the meaning of a Statute, in its application to a particular and concrete subject, is competent (*Leith Police Commissioners*, 1866, 5 M. 247; *British Fisheries Society*, 1872, 10 M. 430, per Ld. Cowan; *Glasgow City and District Ry. Co.*, 1884, 11 R. 1110). On this matter it is thought that "as the constant duty of

judges is to construe Acts of Parliament, the sound rule is that this may be done in a declarator where the language of the Act is really dubious as to its meaning, and the pursuer has an interest to have its meaning declared" (Mackay's *Manual*, p. 376).

*When Declarator necessary.*—In certain cases declarator of a right is necessary before an action with petitory or possessory conclusions can follow. It may be laid down generally, that where a right is not clear either in its nature or extent, a declarator will be necessary. In adjudications, a declarator of expiry of the legal is necessary to render the right of the adjudger irredeemable. See ADJUDICATION. Irritancy of the feu requires declarator. Forfeiture of the feu for non-entry required declarator prior to 1874, but now "an action of declarator and for payment of any casualty exigible at the date of such action has been substituted for it, and no implied entry shall be pleadable in defence against such action: and any decree for payment of such action shall have the effect of and operate as a decree of declarator of non-entry, according to the non-existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses (if any) contained in such decree" (37 & 38 Vict. c. 94, s. 4 (4)). Forfeiture of superiority formerly required declarator, but not since 1874 (Bell's *Lectures*, 2nd ed., vol. ii. p. 786, note (c)). A declarator of irritancy of the right of an entail is necessary (*Bontine*, 1823, 2 S. 116). As to leases, speaking generally, legal irritancies require declarator in the Court of Session: conventional irritancies do not (Mackay's *Manual*, p. 377). But these general rules are subject to certain exceptions: thus, irritancies of long leases can be enforced by action before the Sheriff. Actions of removing at the expiry of the tack are in certain circumstances competent in the Sheriff Court only, and do not require declarator (Rankine on *Leases*, p. 471; Mackay's *Manual*, p. 378). Again, in conventional irritancies, the condition of the irritancy must be reasonable, if it is to be enforced without declarator. Where the irritancy is unusual, the safe course is to proceed by declarator (*Wylie*, 1871, 10 M. 253; Mackay's *Manual*, p. 378). A proving of the tenor is in itself a declarator, and is necessary if important papers are lost which are required to establish a right. When a right is claimed against long possession, a declaratory conclusion must precede any possessory conclusion in the action (*Grierson*, 1882, 9 R. 437; *Lord Lovat*, 1845, 8 D. 316). Where it is desired to show that facts and circumstances go to prove marriage or legitimacy, a declarator is required: or where, on the other hand, the opposite is sought to be shown, a declarator of putting to silence is necessary. See BASTARD: LEGITIMACY: MARRIAGE. An action of division of common heritable property by an heirs-portioner or other *pro-indiviso* proprietor, against the other proprietors, must possess a declaratory conclusion. Wherever an action is founded on a trust, it may be necessary to bring a declarator of the trust, in order that the trustee may prove his right against the truster or his representative (13 & 14 Vict. c. 36, Schedule A, No. 3).—[Mackay's *Practice*, pp. 93–100; Mackay's *Manual*, pp. 78, 79, 175, 374–379; Shand's *Practice*.]

**Declarator (Sheriff Court).**—Declarators are in general incompetent in the Sheriff Court, but a petition otherwise competent is not invalidated by the introduction of declaratory conclusions which are merely introductory (*Murdoch*, 1832, 10 S. 445; *Hall*, 1831, 9 S. 612; *Taylor*, 1824, 2 Sh. App. Ca. 30); but as much as possible they should be kept out (*Wilson*, 1885, 13 R. 21).

Declarators to the following limited extent are made competent in the Sheriff Court by the Sheriff Court Act, 1877, 40 & 41 Vict. c. 50, namely, actions of declarator (*a*) having regard to heritable rights, where the value of the subject in dispute does not exceed £50 by the year, or £1000 in all, and, (*b*) with regard to moveables, where the value does not exceed £1000 (s. 8 (1) and (2)).

*Procedure.*—There are very few points in which actions of declarator differ from ordinary actions in the Sheriff Court, and only the points of difference are noticed here.

In any case of question as to the value of the subject in dispute (which should be stated), the Sheriff determines it after such inquiry as he deems adequate, and such determination is final as regards the competency of bringing the action in the Sheriff Court. If it appears to him that the sum exceeds the amount specified in the Act, he may either dismiss the action, or, on the motion of the pursuer, he may order the Sheriff Clerk to transmit the process to the Keeper of the Rolls of the First Division of the Court of Session. It is then allotted to a Division and to a Lord Ordinary, and proceeds as nearly as may be as if it had been raised in the Court of Session (Sheriff Courts Act, 1877, s. 10). At any time before, or within six days after, the closing of the record, the defender may have the case removed to the Court of Session (*ib.* s. 9); see APPEAL TO COURT OF SESSION FROM SHERIFF COURT (*Removal of Process under the Act of 1877*).

If the case is decided in the Sheriff Court, it may thereafter be appealed to the Court of Session like an ordinary action, but with no restriction as to value (*ib.* s. 9 (3)). Dove Wilson's *Practice*, 58, 59, 397–399.

**Declaratory Adjudication.**—See ADJUDICATION, DECLARATORY.

**Declinature.**—A judge is in certain cases prohibited, either by statute or at common law, from sitting in a cause. His relationship to either of the parties is a disqualification by statute; his interest in the case is a disqualification at common law. In the former case, the disqualification is absolute; in the latter case, the question of whether the interest is such as to disqualify him is determined by the rest of the Court, if there is a quorum. In the former case, the judge cannot sit, even with consent of parties; in the latter, he may, if the interest is not extreme, sit in the cause if the parties put in a minute giving their consent. As it would be invidious to require either of the parties to state the objection, it is an understood thing that the judge states it himself. The rules as to declinature apply to judges sitting in the House of Lords (*Dimes*, 1852, 3 H. L. 759; *London and North-Western Railway Co.*, 1858, 3 Macq. 99). If there is no quorum, in his absence, a judge otherwise disqualified may sit (*Hercules Insurance Co.*, 1837, 15 S. 800). In addition to the grounds for declinature above stated, the fact that a judge has not seen and considered all the documents relating to a cause, has been held to disqualify him (*Innes*, 1827, 6 S. 279).

*Relationship between Judge and Litigant.*—At an early period the Scottish Parliament enacted that the judges of the Court of Session should not sit or vote in any case in which they happened to stand in the relationship of father, brother, or son to either of the litigants (1694, c. 216), which prohibition was subsequently extended to the lesser Courts, and to

the relationship of father-in-law, brother-in-law, and son-in-law, and to that of uncle and nephew (1681, c. 13; *Mowbray's Trs.*, 1882, 10 R. 460; *Caldar*, 1712, Mor. 197). It was held not to extend to uncle and nephew by affinity (*Erskine*, 1787, Mor. 2418). The fact that the daughter of the judge is married to the son of a litigant is also prohibitory (*Corbet Porterfield*, 1821, 1 S. 5). It is not prohibitory that the judge and litigant married sisters (A. S. 16 Feb. 1816; *Binn*, 1687, Mor. 3420). The fact that the judge is equally related to both parties does not remove the objection; nor that the relationship has been dissolved by dissolution of marriage (Ersk. i. 2. 26; but see *Stair*, iv. 39. 14). Declinature will be accepted even where the party related to the judge is not acting for himself, but for another. Thus where a party is a trustee, his declinature will be accepted (*Commissioners of Highland Roads*, 1858, 20 D. 1166, per Ld. Deas); also where a judge stated that his sister was married to the mandatory of one of the parties (*Campbell*, 1866, 4 M. 923; *Ommancy*, 1851, 13 D. 678). Effect will be given to this objection although it is not stated until the last stage of the case. The irregularity creates a nullity: all past proceedings before a judge whose relationship to one of the parties brings him within the provisions of the Statute, are null (*Ommancy*, 1851, 13 D. 678). Moreover, the disqualification of the judge cannot be removed by waiving the objection (*Commissioners of Highland Roads*, *supra*; *Shaw Stewart*, 30 May 1820, F. C.). The fact that a near relative of the judge is proprietor of shares in a company which is party to an action is no ground for declinature (*Spicer*, 1823, 2 S. 252).

*Declinature on the Ground of Interest.*—The objection that a judge is interested in the action does not depend upon statute. What constitutes sufficient interest to induce the Court to accept the declinature is a matter of some difficulty. In questions of relationship, declinature is based upon statute; in questions of interest, declinature is based upon justice, and only subjected to limitations by statute. By A. S. 1 Feb. 1820, it is provided that "the circumstances of a judge being a proprietor, or holding shares of the capital stock of a chartered bank in Scotland, is not a ground of disqualification against his Lordship judging in questions connected with the bank, or wherein it may have an interest." And by 31 & 32 Viet. c. 100, s. 103, it is further provided "that it shall be no ground of declinature that the judge (whether in the Court of Session or in any of the inferior Courts) is a partner in any joint-stock company carrying on as its sole or principal business the business of life and fire or life assurance, where such company is a party to the proceeding in which the judge is called to exercise his jurisdiction"; nor "that any judge is possessed, merely as a trustee, of any stock or shares in any incorporated company, where such company is a party to the proceeding." It is a disqualification that a judge is an ordinary director of a bank, but not that he is an extraordinary director (*Bank of Scotland*, 1738, 5 Bro. Supp. 206; *Maekay's Manual*, p. 17, note (d)). In questions of this nature, the judge who is objected to does not decide on his own declinature; this is decided by the Court, so long, at any rate, as there is a quorum of the Court remaining (*Blair*, 26 Jan. 1814, F. C. vol. 18, p. 501). It is not necessary that the interest be of a pecuniary nature. Where the Lord Ordinary was an essential witness in the cause, the Court remitted to another Lord Ordinary (*Clarke*, 1845, 7 D. 268). The fact that a judge was counsel in the cause prior to his being raised to the Bench is no ground for his declining to hear the case (*King*, 1841, 4 D. 124; *Hall*, 1891, 18 R. 690). The fact that a judge is one of a body of statutory trustees or one of a body of commissioners

of supply (*Edin. Comrs. of Supply*, 1861, 23 D. 933) is no ground for disqualifying him, though if he is a trustee for one of the parties he will be disqualified (*Martin*, 23 Jan. 1840, 15 F. C. 379). In questions of poor-law settlement, being a proprietor in one of the parishes is no disqualification (40 Viet. c. 11). It is no disqualification that a similar question to the one being tried might, at a future date, be raised by or against one of the judges (*Belfrage*, 1862, 24 D. 1132); but if a similar question is pending, and the judge is a party to it, that is a disqualification (*Stair*, iv. 39. 14).

Where a Sheriff-Substitute gave advice in a cause raising the same question, which had already been decided by another Sheriff-Substitute, the Sheriff held that that was not a sufficient ground for declinature (*Henderson's Trs.*, 1896, 12 S. L. Review, p. 59). A declinature is not competent on the ground of enmity, hatred, or prejudice by the judge towards either party: for a judge is supposed to be a man of too great virtue to entertain such (*Stair*, iv. 39. 14). Where the interest is remote, a judge has at times been held not to be disqualified (*Sibbald's Trs.*, 1871, 9 M. 399; *Gray*, 1847, 9 D. 811, p. 813; *Lord Advocate v. Commissioners of Supply for Edinburgh*, 1861, 23 D. 933). It is considered, however, that in the present state of the law "a judge must be deemed disqualified who holds a share in his own right in any company other than a chartered bank, or a joint life or fire and life insurance company, and even as trustee in any company not incorporated" (*Mackay's Manual*, p. 18).

**DECLINATURE IN CRIMINAL CASES.**—It is doubtful whether parties can waive their objection to declinature in criminal cases. In the recent case of the *Calverdon Ry. Co.*, 1897, 4 S. L. T. 365, in the High Court of Justiciary, Lords Adam and Kinnear both proposed their declinature, on the ground that they were shareholders in the company. The case was continued, the Lord Justice-General stating that it was doubtful whether a minute by the parties waiving the declinature, though sufficient in civil cases, was competent in a criminal case.

[*Mackay's Manual*, 17-19; Dove Wilson's *Sheriff Court Practice*, 83-87; *Mackay's Practice*, vol. i. 95-99; Coldstream, pp. 13, 356; Balfour, p. 15.]

**Decree.**—A decree is the written determination of a judge or judges in a cause. The term interlocutor is employed interchangeably with the term decree (*Mackay's Manual*, p. 308). This practice does not seem to be wholly correct: decree appears rather to refer to the matter, and interlocutor to the form of the judgment. The decree is in fact the judgment itself: the interlocutor is the instrument which contains the decree. The word "decern" is essential to make a decree operative (*Anderson*, 1836, 14 S. 863). A decree is always asked for in terms of the conclusions of the summons: whether, however, statements in the condescendence may not be taken as supplementing and explanatory of the conclusions of the summons has been recently discussed, and in the opinion of at least one learned judge (Ld. Young) this may be done. Where a pursuer did not crave against three defenders severally, but stated in his condescendence that they were conjunctly and severally liable, and decree in absence went out against them, his Lordship, in considering the said decree, observed: "I think one is entitled, in construing a decree, to look to the summons and condescendence" (*Milne's Trs.*, 1893, 20 R. 523).

**A. Interim, Final, and Interlocutory.**—From one point of view decrees may be divided into interim, interlocutor, and final. An interim decree is one containing a final decision, but not dealing with the whole subject-

matter of the cause. Thus a decree for payment of a sum of money admittedly or obviously due in an action, where payment of the said sum is only one of several conclusions of the summons, is an interim decree (*Conacher*, 1857, 20 D. 252). An interim decree for aliment to a wife in a consistorial action is another example; so, too, interim decrees for interdict. In the event of an interim decree pronounced in the Outer House having been implemented, it shall be lawful for the Court, in any interlocutor recalling or altering such interim decree, to order repayment, or to pronounce warrant *ad factum præstandum*, or such other order as may be necessary to such recall or alteration (31 & 32 Vict. c. 100, s. 57). A final decree, on the other hand, is a decree dealing with the whole subject-matter of the action. A final decree in the Outer House has been thus defined: "It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided, that expenses, if found due, have not been decerned for" (*ib.* s. 53; see also 39 & 40 Vict. c. 70, s. 3). It is considered that a final decree in the Inner House is similar to the above definition, except that it must contain a decerniture for expenses (*Mackay's Manual*, p. 309). As to interlocutory judgments, the term is obviously an inappropriate one, but it is employed to distinguish a decree which is final, and consequently reclaimable without permission, and a decree which, not being final, can only be reclaimed against with permission (see 31 & 32 Vict. c. 100, ss. 28 and 54; 48 Geo. III. c. 151, s. 15; for Sheriff Court Proceedings, 16 & 17 Vict. c. 80, s. 24; and 39 & 40 Vict. c. 70, s. 27).

B. *Absence, Default, and IN FORO*.—Another division of decrees is the above. (For the first two, see articles on ABSENCE, DECREE IN, and DEFAULT.) Any decree in a defended action is a decree *in foro*. Every decree not in absence is a decree *in foro*. Such a decree is *res judicata* between the parties as to the point decided (*Jenkins*, 1864, 2 M. 1162; revd. 1 L. R. Se. Ap. 117; *Lockyer*, 1876, 3 R. 882). For example, when an action is dismissed as incompetent, the decree is *res judicata quoad* competency. A decree *in foro* must be reclaimed against within the specified time, or it has full effect against the parties. See RECLAIMING; REPOSING.

C. *Condemnator, Absolvitor, Dismissal*.—A decree of *condemnator* is a decree in favour of the pursuer. It is in terms of the conclusions of the action (see ACTIONS—DECLARATORY, PETITORY, etc.). A decree of *absolvitor* is a decree on the merits in favour of the defender, and, unless reversed on appeal, is *res judicata* against the pursuer as to the whole subject matter of the action. A decree of *absolvitor* "from the action as laid" has been held equivalent to dismissal, and does not constitute *res judicata* (*Waterston*, 1884, 11 R. 1036). Such a decree has been held competent when a pursuer's statements are not sufficient to support the conclusions of his summons. Decree of dismissal is a decree dismissing the action as laid, but not so dealing with the merits of the case as to prevent them being retried between the same parties. Decree of dismissal does not form *res judicata*. This has been held even where decree was pronounced in respect of a minute of restriction (*Stewart*, 1868, 6 M. 954). In this case Ld. Deas observed: "We have had this matter again and again before us, and if there be a distinction established in our practice, it is that the

word 'dismiss' is used when it is open to the party to bring another action, and the word 'assolzie' when it is not open." Decree of dismissal is proper in dealing with preliminary defences, or where the pursuer has abandoned his action. Where, on abandonment, the Court assolzied, it was held that in so far as the *interlocutor* interfered with the pursuer's statutory right of new action, it should be viewed as a clerical error and disregarded (*Shirreff*, 1836, 14 S. 825). A final decree of *condemnator* or *absolvitor* can only be set aside by suspension or reduction. See SUSPENSION; REDUCTION; RES NOVITER VENIENS; COMPETENT AND OMITTED; RES JUDICATA.

D. *Decree AD FACTUM PRÆSTANDUM*.—A decree *ad factum præstandum* should be so expressed that the defender shall be in no doubt regarding the obligation he has to discharge. Failure to implement such a decree exposes a defender to the penalty of imprisonment, which it is in the power of the pursuer to put in force. There should therefore be no vagueness about the interlocutor. For instance, in the case of a person being interdicted from doing something, the interlocutor should be so framed as to leave no doubt as to the measure of his liability (*Middleton*, 1892, 19 R. 801).

E. *Decree for Expenses*.—In pronouncing judgment on the merits of a cause, the Lord Ordinary or the Court should deal with the matter of expenses (6 Geo. IV. c. 120, ss. 17 and 21). What falls to be done in the matter of expenses should be settled before counsel leave the bar, subsequent to the disposal of the merits (*Hogg's Trs.*, 1869, 6 S. L. R. 285). In the House of Lords the custom is to decide the question of expenses when the judges are forming and expressing their opinions on the merits, but this has never been the custom in the Court of Session; parties prefer to have the question discussed, if important, apart from the subject-matter (*Allan's Tr.*, 1891, 19 R. 15). The Court may grant an interim finding of expenses in any part of the proceedings that stands alone (*Vaughan*, 1854, 16 D. 922). An interim decree excludes all further claim for expenses upon that particular matter, if the word "modify" be inserted in the interlocutor (*Viscountess Strangford*, 1861, 21 D. 534); if the word "modify" be omitted, the award is regarded as a payment to account only (*Cameron & Waterston*, 1861, 23 D. 535). Decree for expenses in the higher Court carries those in the lower (*Sinclair*, 1855, 17 D. 784; *Darling*, 1852, 14 D. 347). Adherence to the interlocutor of the lower Court does not give expenses in the higher (*Macdonald*, 1880, 7 R. 574. For older practice, see *Martin*, 1830, 8 S. 952; *Lyon*, 1831, 9 S. 308). A simple decree for expenses implies expenses between party and party (*Fletcher's Trs.*, 1888, 15 R. 862). An Inner House interlocutor finding either party entitled to the "expenses of this discussion" does not include the previous expenses in the Outer House (*Rose*, 1835, 13 S. 964), but it does include the expense of the reclaiming note (*Anstruther*, 1856, 18 D. 405). After final judgment on the merits, it is incompetent in a separate interlocutor to deal with expenses, unless the question has been reserved or expressly left open (*Wilson's Trs.*, 1869, 7 M. 457): except, of course, where the omission is clerical (*Walker*, 1858, 20 D. 1102; but see *Wother-spoon*, 1869, 6 S. L. R. 416). Decree for expenses "*generally*" includes all reasonable and judicial expenses incurred in the case, but not the expense of any particular part or branch of the litigation in which the party has been unsuccessful, or which has been occasioned by unnecessary or improper proceedings. It includes the expense of extract (13 & 14 Vict. c. 36, s. 29; 16 & 17 Vict. c. 80, s. 14). It covers, as a rule, the expense of the agent attending taxation, and fee to counsel for moving the approval of the Auditor's report (*Scott*, 1860, 22 D. 922). It does not cover diligence on the depend-



ence (*Symington*, 1874, 1 R. 1006). Nor does it include the expense of a minute restricting the conclusions of the summons (*Fimister*, 1860, 22 D. 1100). For right of agent to take decree in his own name, see LAW AGENT; HYPOTHEC.

*Decree as Evidence.*—Where a document is the official narrative of acts and proceedings which the law requires to be recorded, parole is excluded (Dickson on *Evidence*, s. 205). If lost, however, without being extracted, it may be proved by an action of proving of the tenor (*Duncan*, 1827, 5 S. 840). When brought forward as evidence, a decree cannot be impugned except when challenged on grounds of objections not merely to the regularity of the proceedings, but to the essential justice of the case (Dickson on *Evidence*, s. 1121 *et seq.*). A decree may be proved by extract. Decrees of foreign Courts are admissible, when prepared and authenticated according to the law of the country where they are granted (*Robertson*, 15 Nov. 1814, F. C.). For how far decree in one case conclusive in another, see RES JUDICATA.

[Mackay's *Practice*, vol. i. 582; *Manual*, p. 308; Monteith Smith on *Expenses*; Coldstream, pp. 17, 22; Balfour, 217–220.]

**Decree Arbitral.**—See ARBITRATION.

**Decree Cognitionis Causa.**—See CONSTITUTION, DECREE OF.

**Decree, Dative.**—See EXECUTOR; CONFIRMATION OF EXECUTOR.

**Decree of Registration.**—See REGISTRATION.

**Decreet Conform.**—Before the passing of the Personal Diligence Act, 1838 (1 & 2 Vict. c. 114), a decree of an inferior Court did not warrant diligence out of the jurisdiction of the Court, and did not, except in the case of a decree by magistrates of royal burghs, warrant any diligence beyond pointing and arrestment. Magistrates of royal burghs had power to imprison by ACT OF WARDING (*q.v.*: vol. i. p. 66). Anciently, if a party who had obtained judgment in an inferior Court desired to do diligence not competent upon the decree, he required to raise a new action in the Court of Session, libelling the decree of the Court below, and concluding for a judgment of the Court of Session in the precise terms of the previous decree. The decree of the Court of Session thus obtained was called a *Decreet Conform*, and was a warrant for all legal diligence. This procedure did not apply to decrees of the Commissaries, who were indulged with an execution more expeditious and less expensive. (Letter of Queen Mary to the Lords of Session, 1 March 1563, printed A. S. p. 5.) Upon bare production of the Commissaries' decrees the Court of Session granted warrant for diligence. By the Acts 1592, c. 181; 1606, c. 10; 1609, c. 15; 1612, c. 7, the procedure upon decrees of all the inferior Courts was made the same as in the case of decrees of the Commissaries. On the presentation of a bill or petition, letters of horning were obtained by interlocutor of the Lord Ordinary on the Bills, on the Clerk being satisfied of the validity of the decree of the inferior Court as a warrant for diligence. This process was superseded by the provisions of the Personal Diligence Act, 1838, and

rendered unnecessary by the abolition of imprisonment for debt (Balfour, *Prac.*, 391, 392; Bankt. iii. 3, 9; Kames, *II. L. T.* 343, 346; Dallas, *Styles*, Part i. p. 77; Ross, *Lect.* i. 237, 270).

Before the year 1687, when a minister of a parish desired to do diligence for payment of his stipend upon a decree of locality obtained by his predecessor, it was necessary for him to procure a *Decreet Conform.* This was dispensed with by A. S. 22 June 1687, and it was provided that upon presentation of a bill and production of his presentation, collation, and institution, with the decret of locality obtained by his predecessor, a minister might get letters of horning against persons liable in payment of his stipend (Forbes, *Tithes*, 430).

**Deed of Arrangement** is a statutory deed embodying an arrangement between a sequestered bankrupt and his creditors for terminating the sequestration on terms agreed upon. This mode of terminating sequestration was introduced by the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 35 *et seq.*). It has not been very commonly adopted. The first step is a resolution by the creditors that the estate be wound up by deed of arrangement, and that procedure in the sequestration be sisted for a period not exceeding two months. The resolution may be passed either at the meeting for election of the trustee, or any subsequent meeting called for the purpose. A majority in number and four-fifths in value of the creditors at the meeting is required (s. 35). The resolution is reported to the Lord Ordinary on the Bills, or the Sheriff, within four days; and if he is satisfied of the regularity and reasonableness of the resolution, he may grant the sist, and may make provision for interim management (ss. 36, 37). Any non-concurring creditor may object, and the judgment is subject to review (*Dixon*, 1867, 5 M. 1033). The terms of the deed of arrangement are then adjusted, and the deed, subscribed by the bankrupt and four-fifths in number and value of the creditors, must be produced to the Lord Ordinary or Sheriff within the period of the sist. If satisfied of its due execution and reasonableness, he approves thereof, and declares the sequestration at an end (s. 38). The deed then becomes binding on all the creditors. It may be in any form agreed on—by way of composition contract (23 & 24 Vict. c. 33, s. 5), or of an arrangement for the realisation and distribution of the estate by a trustee, or otherwise. Failure to pay a composition under a deed of arrangement revives the whole debt (*Alexander*, 1873, 1 R. 185). Where the bankrupt is retrocessed in his estate under the deed of arrangement, he cannot, without express power from the creditors, challenge preferences (Bell, *Com.*, 5th ed., ii. 458; *Smith & Co.*, 1889, 16 R. 392). The Bankruptcy Acts make no provision for discharge of the bankrupt in the case of a deed of arrangement, and his right to discharge depends on his stipulating therefor as part of the arrangement. There is no statutory form of a deed of arrangement. The following style is applicable to the case where the deed is in the form of a composition contract:—

It is contracted and arranged between the parties following, viz. *C. D.* and the other persons named and designed in the testing clause hereof, being four-fifths in number and value of the creditors of *A. B.* on the one part, and the said *A. B.* on the other part, in manner following:—That is to say, the said parties, considering that the estates of the said *A. B.* were upon the                      day of                      , sequestered on his own application, by the Lord Ordinary officiating on the Bills [*or*, by the Sheriff of                      , as the case may be], and that at the meeting of creditors held on                      , for the election of a trustee, a majority in number and four-fifths in value of the creditors present, or represented, at the meeting, resolved that the estate ought to be wound up under a deed of

arrangement, and that an application should be presented to the Lord Ordinary [or, the Sheriff], to sist procedure on the sequestration, for the period of [not exceeding two months]: And further, considering that *C. D.* [design] duly reported said resolution to the Lord Ordinary [or, the Sheriff], and applied for a sist of the sequestration in terms thereof, and his Lordship was pleased to find that the resolution had been duly carried, that the application was reasonable, and granted the same: And lastly, considering that various communications have taken place between the foresaid parties, with respect to a proper arrangement being made between them, with a view to winding up the sequestration,—have arranged, and do, by these presents, arrange as follows:—The said *A. B.* as principal, and *G. H.* [design] as cautioner, surety, and full debtor, for and with him, hereby bind and oblige themselves, conjunctly and severally, and their heirs, executors, and successors whomsoever, to content and pay the whole just and lawful creditors of the said *A. B.*, at the date of the sequestration of his estates on the said \_\_\_\_\_ day of \_\_\_\_\_, the full amount of their respective debts; and particularly without prejudice to the foresaid generality to the said *C. D.*, the sum of £ \_\_\_\_\_ [here enumerate the whole known creditors, and the amount of their respective debts], and that by two equal instalments of 10s. per pound each, payable at the counting-house of me the said *A. B.*, No. \_\_\_\_\_ Street, Edinburgh, at four and eight months from the date of the present deed of arrangement being approved of, and the sequestration declared at an end; together with interest at the rate of \_\_\_\_\_ per centum from the respective dates at which the same may have become due till the foresaid stipulated terms of payment thereof, and till paid: And the said *A. B.* and *G. H.* further bind and oblige themselves to grant promissory notes for said instalments in favour of the several creditors, whenever required by them; and the said *A. B.* binds and obliges himself and his foresaids to free and relieve, harmless and scathless keep, the said *G. H.* and his foresaids, of payment of the said sums, principal and interest, or any part thereof, and all loss, damage, and expense which he may incur by his becoming cautioner in manner foresaid. For which causes, and on the other part, the said *C. D.* and the other creditors of the said *A. B.*, hereto subscribing by themselves or their mandataries, hereby consent and agree, but always at the expense of the said *A. B.*, to make any appearance in court that may be necessary for having the present deed of arrangement approved of, and the sequestration declared at an end, and that they shall supersede all manner of execution and diligence competent to them against the person or estate of the said *A. B.*, till the foresaid instalments or promissory notes, if granted in satisfaction of their respective debts, shall become due and exigible, and they further consent and agree, both as between them and the said *A. B.*, and *inter se*, not to require or accept of payment of their respective debts till the above stipulated terms of payment thereof, and not to require or accept of any preference or security from the said *A. B.* for the same; but reserving always to any creditors who at the date of the sequestration held a security not thereby null and reducible, the full benefit of such security; and the said parties consent to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation, and that letters of horning on six days' charge, and all other execution needful, may pass upon a decree to be interponed hereto in common form, and thereto constitute \_\_\_\_\_ their procurators.—In witness whereof, etc. [Testing clause enumerating names and designations of four-fifths in number and value of the creditors, etc.]

[Goudy on *Bankruptcy*, 436 *et seq.*] See SEQUESTRATION.

**Deeds, Execution of.**—The purpose of all rules and practices in regard to formalities in the execution of deeds is to secure deliberation and authenticity. The following is a list of the chief Statutes which have been passed on the subject:—

1540, c. 117.—In addition to sealing, the granter was to sign before witnesses; or if he could not, then by a notary; but it is not clear whether the witnesses required to sign, especially in cases of notarial execution.

1579, c. 80.—All deeds relating to heritage, or to moveables over £100 Scots were to be signed and sealed; or if the granter could not write, then by two notaries and four witnesses, who were to be designed; but it is not clear whether there were to be four witnesses when the granter himself signed, nor whether any witnesses were required to subscribe. If the witnesses' designations were omitted, they were allowed to be supplied

by separate subsequent condescendence,—a rule abolished in 1681, but revived under sec. 39 of the 1874 Act.

1584, c. 4.—Sealing dispensed with in certain cases; and it soon fell into general desuetude.

1593, c. 179.—The name and designation of the writer of the body of the deed (but not of the testing clause) were required to be inserted in the testing clause.

1681, c. 5.—This is practically the foundation Statute. It required: (1) signatures of both witnesses; (2) designations of witnesses and of writer of the body of the deed, but not of the testing clause; and subsequent condescendences thereof were abolished; (3) witnesses must know the granter, and see him sign or hear or see him acknowledge his signature; or hear or see him give warrant to notary and touch the notary's pen.

1696, c. 15.—Deeds might be written bookwise, provided (1) the pages were numbered, (2) each page signed by granter (but witnesses were to sign the last only), and (3) number of pages inserted in testing clause.

1856, 19 & 20 Vict. c. 89.—The numbering of the pages was dispensed with both for past and future; but it was still expressly left necessary (1) to sign each page, and (2) to insert number of pages in testing clause.

1858, 21 & 22 Vict. c. 76, s. 34; 1860, 23 & 24 Vict. c. 143, s. 20.—Deeds were allowed to be partly written and partly printed or engraved, provided that the names and designations of (1) the witnesses, (2) the writer of the written parts of the body of the deed, (3) the writer of the written parts of the testing clause, were “expressed at length in writing”; and though it was not made necessary to specify either (1) the date or (2) the number of pages, if these were given they also were to be “expressed at length in writing.” The new essentials here were: (1) the *names* of the witnesses: (2) the name and designation of the writer of the written parts of the testing clause; and (3) the requirement that date and number of pages must, if given at all, be “at length,” which presumably meant in words and not in figures.

1868, 31 & 32 Vict. c. 101, s. 149.—These requirements were relaxed. All deeds were allowed to be partly written and partly printed or engraved or lithographed, provided that the names and designations of (1) the witnesses, and (2) the writer of the written parts of the body of the deed, were “expressed at length”; but it was still left necessary that the specification of the date and pages, if given at all, should be “at length.” The requirement of naming and designing the writer of the written parts of the testing clause in such deeds was abolished, with retrospective effect.

#### NON-ESSENTIALS.

After this very brief reference to the earlier Acts, and before passing to the Act of 1874, it will be convenient to state shortly certain things which, though commonly inserted in testing clauses, have never been essential. These are—

1. The date.
2. The place of execution.
3. The name of the writer of the testing clause (except under the Acts of 1858 and 1860, down to 1868).
4. The *names* of the witnesses in the testing clause.
5. The addition of the word “witness” after the witnesses’ signatures.

#### THE 1874 ACT.

The Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), made

radical changes in the system of execution of deeds. The important general secs. are 38 and 39.

Under sec. 38 the following previous essentials are dispensed with:—

1. The name and designation of the writer.
2. The specification of number of pages.
3. The designations of the witnesses in the deed or testing clause, provided such designations follow the witnesses' signatures; and the designations may be added at any time before the deed is recorded for preservation, or is founded on in any Court, and they need not be written by the witnesses themselves.

Sec. 39 provides that no deed "subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing," is invalid because of "any informality of execution." But the burden of proving the signatures of the grantor and witnesses lies upon the party upholding the deed, and such proof may be led in any case in which the deed is founded on or objected to, or in a special application to the Court of Session or to the Sheriff of the defender's domicile.

The provisions of secs. 38 and 39 are not retrospective. They have no application to deeds dated before 1 October 1874 (*Gardner*, 1878, 5 R. 638, 5 R. (H. L.) 105). But it is assumed that they would apply to testamentary writings made before 1 October 1874, but coming into effect on the death of the grantor after that date (see *Addison*, 1875, 2 R. 457).

The relief given by the Statute is limited to "informality of execution," and the question at once arises what is and what is not a formality of execution. The expression in the Act might naturally imply a distinction between formalities and essentials, but on the other hand it is plain from the section that it covers what would otherwise have rendered the deed "invalid." In one of the earliest cases (*McLaren*, 1876, 3 R. 1151), *Id.* Deas took occasion to observe that the only omission which the Statute contemplated might be remedied by a proof was the omission to sign every page in a deed consisting of more than one sheet of paper. In that case the section was applied to such an omission—the deed consisted of more than one sheet, and the last page only was signed. The decision was given by a bare majority of consulted judges: it has been followed (*Brown*, 1883, 11 R. 400), and may be safely regarded as conclusive. But the section covers other omissions and defects also, including the following: Such an interval between the acknowledgment by the grantor of his signature to the witnesses and their own signatures as would expose the deed to nullity under the Statute 1681 (*Thomson*, 1892, 20 R. 59); an omission to design the witnesses either in the deed or after their signatures, assuming that the simpler remedy under sec. 38 has been lost (*Thomson*, 1878, 6 R. 141); an error in filling up the testing clause, *e.g.* in the name or designation of a witness (*Richardson*, 1891, 18 R. 1131); an omission to fill up the testing clause of a will during the lifetime of the testator (*Addison*, 1875, 2 R. 457). The last decision was given partly on the ground that there was a doubt of the trustees' power to add the testing clause at their own hands after the death, the Lord President (Inglis) remarking that there was "sufficient doubt" to entitle the Court to apply the section; but there were also alterations on the will by the testator unauthenticated. This last point suggests that the section would cover the case of failure to authenticate marginal additions, interlineations, and erasures; and it is thought that defects arising from the subscription of grantor or witnesses, or both, on erasure, would be within the section, if indeed these last cases require the statutory aid at all (*Brown*, 1888, 15 R. 511).

All these decided and suggested cases assume that there is a deed which has been signed by the grantor before two witnesses, who either saw him subscribe or heard him acknowledge his signature. But the larger question has been raised: Does not the Statute go further, and abolish all solemnities, witnesses included, with this difference, that whereas an *ex facie* complete and perfect deed proves itself, the burden of proof is shifted where the statutory relief is taken advantage of? This question has been considered or referred to in several cases (*Smyth*, 1876, 3 R. 573; *Brown*, 1888, 15 R. 511; *Geddes*, 1891, 18 R. 1186; *Thomson*, 1892, 20 R. 59). *Smyth's* case was a judgment against any such extension of the scope of sec. 39. The ground of the judgment was that the Act still requires not only a genuine signature, but also a signature attested in one particular way, namely, by the signatures of two witnesses. "It would be a different matter if the Act had allowed proof that the grantor of a deed had really signed it." But it might be a misapplication of *Smyth's* case to quote it as deciding that a deed would be null on the sole ground that the witnesses signed before the grantor, if, in fact, they saw him subscribe, or at least that such a case would not be within sec. 39.

In *Brown's* case the facts were that the will bore to be regularly attested, but the grantor's signature was on erasure. It was held that the document was *ex facie* probative, and that therefore the *onus* lay on the challenger. It was suggested that the true history of the document might be that at an interval, after all the signatures had been adhibited, the testator had erased his signature in order to improve upon it, and had then signed again on the erasure in the absence of the witnesses and without further reference to them. On the question of what the result of that would be, if proved, Ld. Rutherford Clark said it "would be a fatal or a formidable objection—I think probably fatal." Ld. Young indicated an opinion *contra*. Ld. Rutherford Clark further said: "The signature of the party is of no avail as making a valid deed unless it be duly witnessed in terms of the Statute." The rubric bears that the *onus* on the challenger was to prove "that the signature was not genuine, or, if genuine, that it had not been duly tested." This is clear to the effect that a genuine signature cannot be set up if unattested: but it seems to go beyond the judgment, and to rest only on Ld. Rutherford Clark's *dictum*.

In *Geddes* the facts were that it was proved by the party attacking the deed that the witnesses, or at least one of them, neither saw the grantor sign nor heard him acknowledge his signature, and it was not proved by the party supporting the deed that the grantor had signed it. The Second Division, following Ld. Young, refused effect to the deed, which is accordant with *Smyth*. But Ld. Young expressed the opinion that "the law still remains that, in order to the regular execution of a deed, the grantor's subscription must be adhibited or acknowledged in the presence of the attesting witnesses. If there is an omission of this formality, it is not now fatal to the deed, as formerly, but it puts upon the party using the deed, and founding upon it, the burden of proving the deed to be genuine. . . . The consequence of the irregularity might be removed by evidence that it was really executed by the pursuer by whom it bears to be executed." The other judges did not intimate either assent to or dissent from this opinion. The same view was admitted in the arguments, and neither *Smyth* nor *Brown* appears to have been referred to.

*Thomson's* case was decided on the ground that there was not such delay between the acknowledgment by the grantor and the witnesses' signatures as to invalidate the deed under the Act 1681. But the Court

were of opinion that, even if that were otherwise, sec. 39 would apply: and Ld. Rutherford Clark expressed the opinion that "the Act of 1874 requires, I think, the Court to sustain all deeds which were signed by the grantor, and *honestly attested by the instrumentary witnesses*. . . . I do not think it dispensed with the necessity of witnesses."

Apart from the construction of the Act, there can be no doubt that the view expressed by Ld. Young has much to recommend it. The result would be to assimilate deeds in that position to all ordinary attested deeds under English law, *i.e.* they would not of their own inherent virtue be probative: proof would be required, but it would also be competent and sufficient. That does not commend itself as a desirable system if it were to be exclusive of all others. And if, on the other hand, it were to exist alongside a system of deeds probative by attestation, there is this to be said against it, that it might lead to confusion by bringing into existence deeds and wills, genuine, no doubt, but not the deliberate, final, completed act of the grantor. But, apart from considerations of that nature, and on the construction of sec. 39 of the Act of 1874, there appears no room for doubt but that *Smyth's* judgment and Ld. Rutherford Clark's opinion in *Brown and Thomson* are correct. It is true that the phraseology of the section is somewhat peculiar: it requires that the deed shall be "subscribed by the grantor," but it is enough if "*bearing to be attested by two witnesses subscribing*." But, in any case, it is clear that Ld. Rutherford Clark is correct in saying that the Act has not "dispensed with the necessity of witnesses" in this sense, that it expressly requires their *signatures* as the condition of sec. 39 operating, and the proof of the witnesses' signatures is essential under the section. If, therefore, Ld. Young's opinion in *Geddes* means that proof of the genuineness of the grantor's signature, without witnesses at all, is enough to set up the deed, it is submitted that it is clearly wrong. The only other view would be, that if the deed "bears to be attested" by two witnesses, and if their signatures and that of the grantor are proved to be genuine, the deed will be set up, though in point of fact the so-called "witnesses" may have neither seen the grantor's signature exhibited nor heard it acknowledged, nor, indeed, have had any warrant whatever for signing as witnesses. Such a view is extravagant and worse. If it had been intended to allow the genuine signature of the grantor to validate the deed, the Act would have said so in distinct and straightforward terms, and would not have made such a reform (or at least change) conditional upon it being conjoined with what could only be described as a pretence and a fraud.

On the matter of comparison between the remedies provided by sec. 38 and sec. 39 respectively, and on the relation of the one section to the other, it is to be noted that the sections overlap, so far as regards the one remaining essential in the execution of a self-supporting deed (apart, that is, from the signatures of grantor and witnesses, and authentication of alterations, if any), *viz.* the witnesses' designations. The difference is that sec. 38 gives an extrajudicial remedy, to be used by the holder of the deed at his own hand, whereas the remedy under sec. 39 is available only under judicial process and sanction. Suppose, then, that a mistake has been made in identifying or designing the witnesses, or one of them, recourse will naturally be had to sec. 38, if it is available, and the question at once arises: When does it come too late? The section says, "before the deed shall have been recorded in any register for preservation, or shall have been founded on in any Court." As to registration as a bar, it will be noted that registration for preservation only is referred to. Recording in

the Register of Sasines for publication only would apparently not have that effect; the difference being that when a writ is registered for preservation, it passes permanently out of the control of both grantor and grantee, which is not the case when a deed is recorded merely to operate infestment. Then, as to the other bar,—expressed in the words “founded on in any Court”—the older phrase is “production in judgment,” which always terminated the power of the parties over the testing clause. It is assumed that the two phrases are to be taken as identical. Two cases may be contrasted, the one before and the other after the 1874 Act (*Hill*, 1870, 9 M. 223; *Millar*, 1876, 4 R. 87). In *Hill's* case the informality was the omission of the name and designation of the writer. The action was by a legatee under the document against the executrix for payment of his legacy. He knew the terms of the document; he had a copy of it; he founded on it, and called for its production. The defender thereupon produced it, and it was then held too late to rectify the mistake in the deed. *Ld. Neaves* was not prepared to say “that the same result would have followed had there been mere production of the deed, as in exhibition *ad deliberandum*, or a diligence for the purpose of *comparatio litterarum*.” In *Millar's* case the testing clause had not been filled up. The deed was lodged in process by the party interested to upset it; but it was held that it was still open to his opponent, who had the opposite interest, to complete the deed. Further, it was said, “even if the deed had been produced incomplete by a legatee or beneficiary who actually founded upon it, this would not prevent other legatees or other beneficiaries, who had not founded upon it, from insisting that it be duly and regularly completed in common form.” And in *McLaren* (*supra*, p. 402) the opinion was clearly indicated that the production of the deed in a “special application,” under sec. 39, for declarator that it was effectual notwithstanding that the last page only was signed, was not “founding” upon it in the sense of sec. 38 so as to prevent the holders thereafter adding the witnesses’ designations, which were wanting. But the point is of comparatively little importance, for, even if it were otherwise, the application under sec. 39 might simply be extended so as to cure *both* defects. And, indeed, all these questions as to whether there has been such registration or judicial production as to deprive the holder of his power of completion and rectification, now resolve themselves into little more than a matter of expense, in view of the relief available under sec. 39. But to this there appears to be one very important (though happily extremely rare) exception. Suppose a deed is duly signed by the grantor before two witnesses, and even, it may be, that the testing clause is filled up, but that, in fact, the witnesses have not signed, and that, under these circumstances, the deed is produced in judgment or registered for preservation. What is the result? and is there any remedy? It is thought not. In the first place, sec. 39 is inapplicable, for even if it could be held that, in respect of the completed testing clause, the deed bore “to be attested by two witnesses subscribing” (which it is thought would be wrong), it manifestly could not be proved, as the section requires shall be proved, that the deed “was subscribed . . . by the witnesses.” But, except for the statutory relief given under the conditions of sec. 39, the deed is beyond the power of the parties by the fact of production in judgment or registration for preservation. The result, therefore, appears to be that, as the error cannot be cured under sec. 39, it cannot be cured at all. (See *Moncrieff*, 1896, 23 R. 577.) As to what is or is not “production in judgment,” see, further, *Todd*, 1883, 20 S. L. R. 382, where the point was considered but not decided. In one case, even before 1874, the Court gave



effect to a deed notwithstanding that a fatal omission had been rectified after the deed had been produced and founded on (*Macpherson*, 1855, 17 D. 357), but that was expressly recognised as a "very peculiar and singular case."

The next question, then, is as to the relation between secs. 38 and 39. This came up and was treated in *Thomson* (1878, 6 R. 141), where it was laid down that it is "not necessary to hold that the 39th section refers to different informalities from those which are dealt with in the 38th section." In that case the mistake was that the witnesses were not designed. It might have been rectified under sec. 38 by adding the designations to the witnesses' signatures. But the deed had been registered and judicially founded on, and therefore that *de plano* procedure was shut out by the limit imposed under sec. 38. It was argued that on such a matter sec. 38 was of sole application and was final, and that therefore there was no remedy at all. But it was held that sec. 39 applied, notwithstanding that there would have been a simpler method under sec. 38, if taken in time.

The practical working of sec. 39, and the procedure and proper forms, will be seen in *Richardson* (*supra*), and *Garrett* (1883, 20 S. L. R. 756). It is no part of the purpose of the section to give a declarator that a document is a valid deed (*Addison*, 1875, 2 R. 457). Even before 1874 the Court allowed a correction to be made on a deed after registration for preservation (*Caldwell*, 1871, 10 M. 99); but there was no opposition, and the Court gave no opinion as to the effect of the correction thus made. The authority was granted under 31 & 32 Vict. c. 34, s. 1.

#### SIGNATURES.

The signature must be the signer's own act. It is fatal if he simply blacken over lines made by another (*Crosbie*, 1749, M. 16814), or if his hand be guided (*Moncrieff*, 1710, M. 15936), though it may be supported above the wrist (*Noble*, 1875, 3 R. 74). The signature need not be legible (*Crawford*, 1885, 12 R. 610). In the same case it was decided that execution by a stamp is invalid, and so is the use of a "cyclotype" (*Whyte*, 1893, 21 R. 165); and so is a mark (*Crosbie*, 1865, 3 M. 870), except in a few privileged cases (p. 414). Initials are sufficient, if proved to have been genuine and accustomed (*Speirs*, 1879, 6 R. 1359); but this applies to the granter only, not to the witnesses (*Meek*, 1707, M. 16806). The Act 1672, c. 21 contains provisions as to the name which parties are to subscribe, but non-observance does not infer nullity (*Gordon*, 1765, M. 16818). A married woman may sign her maiden name (*Dunlop*, 1863, 2 M. 1). A signature on erasure is sufficient, and is no objection to the probative character of the deed (*Brown*, 1888, 15 R. 511); but the contrary had previously been held as to the signature of a witness (*Gibson*, 16 June 1809, F. C.), but *quære*. As to alterations on signatures, see *Crawford*, *supra*.

[*Ersk.* iii. 2. 7; *Menzies*, 100; *Bell*, *Covey*, 35; *Dickson*, *Evidence*, 411.]

#### WITNESSES.

The following are incompetent as witnesses: all persons under fourteen years of age, all those *non compos mentis*, and blind persons (who could not attest that they "saw him subscribe" 1681, c. 5). Down to 1868 women were considered incompetent, or at least serious doubts were entertained, but by the 1868 Act, s. 139, they were declared competent, with retrospective effect, provided they are "of the age of fourteen years or upwards, and not subject to any legal incapacity." This extends to all deeds, whether relating to moveable or heritable estate (*Hannay*, 1873, 1 R.

246). It is thought to be clear that marriage is not a "legal incapacity," but it is not advisable that a wife should attest her husband's deed. Interest is not a disqualification, though it may be an element against the deed (*Simsons*, 1883, 10 R. 1247).

By the 1681 Act no one is to attest another's signature "unless he then know that party," but credible information is enough.

The granter must either sign in presence of the witnesses, or he must "at the time of the witnesses' subscribing acknowledge his subscription." But it is not fatal that witnesses who only heard the signature acknowledged did not sign in the granter's presence, but apart, and nearly an hour afterwards (*Thomson*, 1892, 20 R. 59). The acknowledgment need not be in words (*Cumming*, 1879, 6 R. 540, 963). It is even laid down that it will be sufficient if "the witness is brought into the room where the party is, and the man of business, in the hearing of the party, desires the witness to sign as witness to the party's subscription, the party allowing him to do so without opposition" (*Bell, Attestation of Deeds*, 273). It is not necessary that the witnesses either act or sign together. The deed may be signed in presence of one and acknowledged separately to the other, or acknowledged to both at different times separately (*Hogg*, 1864, 2 M. 848).

Who is a witness? It is not necessary that the witnesses be specially called as such. A "casual, accidental, or concealed witness" will not do. It is enough if the witnesses "are legitimately present, and openly stand by and see what is done" (*Tener*, 1879, 6 R. 1111).

The witnesses may sign at any time before the deed is registered for preservation or produced in judgment, and even after the death of the granter (*Arnott*, 1872, 11 M. 62; *Stewart*, 1877, 4 R. 427; *Tener, supra*); but obviously delay is very dangerous, for if one of the witnesses were to die before signing, there would be no remedy short of re-execution, which might not be possible. If the same witnesses attest more than one subscription, they need strictly sign once only, even though the attested signatures be adhibited at different times and places (*Edmonston*, 1749, M. 16901); from which it appears to follow that a deed signed by A. before X. and Y. as witnesses, and by B. before Y. and Z. as witnesses, would be effectual though Y. signed once only, provided, at least, he did so after both A. and B. had signed. But such a practice is quite unknown, and of course should not be adopted.

Though it is necessary to the validity of a deed that the witnesses should see the signature adhibited, or that it be acknowledged to them, a party who gives forth an onerous deed, *ex facie* regular, will not be allowed to found upon the non-observance of the Statute as creating a latent nullity with the object of cutting down his own deed (*Baird*, 1883, 11 R. 153).

[*Ersk.* iii. 2. 11; *Menzies*, 108; *Bell, Convey.* 50; *Dickson, Evidence*, 423.]

#### AUTHENTICATION OF ALTERATIONS.

The ordinary alterations are: (1) marginal additions; (2) deletions; (3) interlineations; and (4) erasures.

*Marginal Additions.*—These require to be expressly authenticated in ordinary deeds. The usual way is by signing the Christian name on one side and the surname on the other. But *quare* whether initials would not be enough, assuming that the signature was at the foot of the page; also, whether it ever was essential to refer to the addition in the testing clause, though that was and is the universal practice.

*Deletions and Interlineations* are not usually authenticated in any way except by mention in the testing clause. In the latter case, if an addition

is of any importance, it ought to be made by marginal addition signed and specified.

*Erasures.*—The rule is that the erasure must be specified in the testing clause, and that that is enough. On this rule Ld. Young observes: "I confess that I have always regarded our law of erasure as mischievous . . . It is peculiar to our law, and, with all our excellences, we have our peculiarities . . . There are peculiarities in every system. This is a peculiarity of ours, and I do not know the equal of it" (*Brown*, 1888, 15 R. 511). If not authenticated the words will be held *pro non scriptis*, the effect of which, again, will depend on the nature of the words and the clause in which they occur, and its and their relation to the whole deed. But though the words on erasure cannot receive effect, the result is not to entitle the objector "to read anything he pleases in their place, even to the destruction of the deed" (*Gollan*, 1863, 1 M. (H. L.) 65; *McDougall*, 1875, 2 R. 814, Ld. Ormisdale, at p. 822).

By the Act 6 & 7 Will. IV. c. 33, erasures in instruments of sasine (not *proptiis manibus*) and instruments of resignation *ad rem*, were declared unchallengeable on the ground of erasures, unless it was proved that the erasures were made fraudulently, or the record was not conformable to the instrument as presented for registration: this was extended to all notarial instruments by the 1868 Act, s. 144: and a like provision is contained in sec. 54 of the 1874 Act, applicable to erasures in the *record* of any "deed, instrument, or writing recorded in any Register of Sasines."

[*Menzies*, 123; *Bell*, *Convey.* 67; *Dickson*, *Evidence*, 442; *McLaren*, *Wills*, 283.]

#### THE TESTING CLAUSE.

No testing clause is now essential, except for the purpose of authenticating alterations. But in practice, even when the provisions of sec. 38 of the 1874 Act are taken advantage of, the deed will end with a short clause in terms such as these:—

In witness whereof I have subscribed these presents at Edinburgh, on the 1st day of May 1896, before the witnesses hereto subscribing, whose designations are appended to their signatures. A. B.

*C. D.*, Writer to the Signet, Edinburgh, *Witness*.

*E. F.*, Clerk to the said *C. D.*, *Witness*.

Such a form is equally available when there are two or more granters, if they all sign before the same witnesses. But if not, it is necessary either to name and design the witnesses in the testing clause, as before 1874, or to add doequets in the form familiar in English deeds and in ordinary transfers of stock, so as to attach the proper witnesses to the signature or signatures which they attest.

It has been seen that the witnesses' names never were essential in the testing clause, provided, that is, that the designations given in that clause clearly refer to the subscribing witnesses. Accordingly, an erasure in the name of a witness in the testing clause has been held no objection (*McDougall*, 1875, 2 R. 814). Nor is bad spelling a defect. But an error in the name was fatal before 1874, if not corrected in time, and it will still be a defect, though curable under sec. 39 (*Richardson*, 1891, 18 R. 1131). The reason is that *ex facie* the witness signing and the witness designed are not the same man, and therefore the subscribing witness is not designed, and the Act 1681 is violated. Obviously, it is not easy to say what is such an error as will have this effect (*Dickson*, 438, and cases cited). In *Richardson* the witness' name was "Robertson" and the name in the

testing clause was "Robertson." Authority to correct was given, Ld. McLaren, however, suggesting a question whether "a blunder such as we have here would have invalidated the deed at common law."

[Menzies, 117, 167; Bell, *Convey.* 58, 233; Dickson, *Evidence*, 439.]

The testing clause may be filled up at any time, even after the death of the principal party (Ld. Ormidale in *Veasey*, 1875, 2 R. 748), *i.e.* so long as the deed has not been registered for preservation or produced in judgment.

"A testing clause which may have been, and probably was, inserted after subscription ought not to contain, and cannot legitimately contain, any terms which would, if given effect to, cut down or modify the agreement which the parties had in point of fact executed" (Ld. Watson in *Blair*, 1896, 23 R. (H. L.) at p. 48). Apparently this holds even though it were proved that the testing clause, at least to the extent of the special matter imported, had been written before subscription (*Smith*, 1877, 5 R. 97; on this head see the references by Ld. Kincairney and Ld. Shand to *Smith* in *Blair*, at pp. 43 and 52). In *Blair's* case the addition had manifestly been written after the signatures.

#### NOTARIAL EXECUTION.

When a party to a deed is unable to write, he may have the deed executed for him by a notary public or justice of the peace; a blind person may so execute; and in the case of wills the parish minister is entitled to act "as notary public in his own parish."

Notarial execution is dealt with in the Statutes 1540, c. 117; 1579, c. 80; and 1681, c. 5, all before referred to (p. 400); and by the 1874 Act.

The Act of 1579 required that all writs relating to heritage or to moveables over £100 Scots should, if the party could not write, be executed by two notaries and four witnesses. This remained law to 1874. The amount was calculated from the point of view of the obligant. A corroborative obligation in excess of £100 Scots might be executed by one notary and two witnesses (*Jack*, 1671, Mor. 12975, 16836). As regards wills of moveable estate, Erskine (iii. 2. 23) and Stair (iii. 8. 34) are clear that one notary and two witnesses were sufficient, no matter what might be the amount of the estate. A doubt was at one time suggested (*Gulletly*, 1843, 6 D. 1), but the rule was recognised in a recent case (Ld. McLaren in *Campbell*, 1895, 22 R. 443).

The Act 1681 required that the granter should touch the notary's pen in token of warrant to subscribe, and that this should be in presence of the witnesses.

By the Act of Sederunt 21 July 1688 it was required that the notaries should be satisfied of the identity of the granter.

If two notaries signed, they did so *unico contextu*; all four witnesses attested each and both of the signatures; and, in any case, the notaries signed in presence of the witnesses: acknowledgment to the witnesses was not enough, nor is it now.

The 1874 Act has made very considerable changes. The section (41) and schedule (I) are in the following terms:—

Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter who from any cause, whether permanent or temporary, is unable to write, by one notary public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses; and the docket thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to

him in presence of the witnesses. Such docket may be in the form set forth in Schedule I hereto annexed, or in any words to the like effect.

The schedule runs: By authority of the above named and designed *A. B.*, who declares that he cannot write on account of sickness and bodily weakness [*or*, never having taught, *or otherwise, as the case may be*], *I, C. D.* [*design him*], notary public [*or*, justice of peace for the county of (*name it*), or, as regards wills or other testamentary writings executed by a parish minister as notary public in his own parish, minister of the parish of (*name it*)], subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docket in testimony of their having heard (*or*, seen) authority given to me as aforesaid, and heard these presents read over to the said *A. B.*

*E. F., Witness.*

(Signed) . . . . . Notary Public

*G. H., Witness.*

[*or, Justice of Peace, or, Parish Minister.*]

In order to see the changes introduced by the Act, it is necessary to state the essentials prior to the Act, as to which see *Aitchison* (1876, 3 R. 388). These were: (1) authority given by touching the pen (2) and given so as to show understanding of what was being done, and for that purpose the granter ought to have stated the fact and specified the cause of his inability to write; and (3) these things must have been done in presence of the witnesses. The docket required to set out the first and third points, but not necessarily the second.

Now (1) one notary and two witnesses are sufficient in all cases; (2) a justice of peace may act in place of a notary; (3) the ceremony of touching the pen is abolished, but authority must still be given; (4) the declaration of inability to write, and the reason why, is essential; (5) the deed must be read over to the granter *before* signing; (6) all these things—authority, declaration, and reading—must be in presence of the witnesses; and (7) they must all be set out in the docket.

*Authority.*—The schedule expressly contemplates that the authority may be by word or act. Various difficulties may be figured by a combination of inability to write with the want or loss of some of the senses; but practically such cases, if serious, would probably be met by judicial management.

*Declaration.*—This rests upon the schedule only, and not upon sec. 41 otherwise than by reference to the schedule. The word “declares” would naturally imply that it was to be verbal, but that might be impossible; and in that case, at anyrate, it would no doubt be sufficient if made by act, in like manner as the authority may be given, *e.g.* a nod of assent in answer to a question.

*Reading.*—This must be previous to the signing. It is not expressly stated that the notary must be present; but that is implied, for he must testify to the fact in the docket; and how is he to do that if he was not present? But it certainly is not necessary that the notary should be the reader. Nor is it necessary that the reading be done by either of the witnesses; but there is no objection to that course, though in that case the statement that both witnesses “heard these presents read” is not very happy. Then suppose the granter is deaf, the reading is an idle form; but, being a statutory solemnity, it must not be omitted, though it would be prudent to have it supplemented by a second reading aloud by the granter himself in presence of notary and witnesses, and to set forth the full facts in the docket. The reading by the granter could not be relied upon by itself alone, for the statutory solemnity is that the deed shall be “read over to him.” Another question is: What is “reading over”? Of course the only practical advice is to read everything *verbatim*; but is that essential? and separately, assuming that it is, and that in fact it has been done, will any, and what, variation of expression in recording the fact in the docket be fatal?

These questions came up, but were not decided, in *Watson* (1883, 11 R. 40). In that case the docket bore that the deed had been "gone over and explained," and the party supporting the deed offered to prove that it had been read *verbatim*. Ld. Adam (Ordinary) refused a proof; but the Second Division (Ld. Rutherford Clark dissenting) allowed proof before answer, with a careful reservation of opinions: and the case was settled. It cannot be maintained that the expression "read over" in the docket is essential, for the Act allows "words to the like effect" (*Aitchison*, 1876, 3 R. 388). But of course the words used must not be inconsistent with "reading over," as these words may be interpreted. On that point it is possible to doubt whether it is essential that everything which is signed must be *verbatim* read, e.g. an inventory of titles annexed to the deed: it is "the deed" the reading of which the section states is to be set out in the docket.

*Witnesses' Presence*.—The docket is express that the authority must be given, and the reading take place, in presence of the witnesses. It is not so express that the declaration of inability to write, and the cause of it, must be made in their presence, but it is thought that such is clearly the correct view, both because the words "all in presence of the witnesses" are broad enough to cover it, and also because the whole is one act.

*Docket*.—It has always been, and still is, necessary that the docket should be holograph (*Henry*, 1871, 9 M. 503; *Irvine*, 1892, 19 R. 458; *Campbell*, 1895, 22 R. 443). Where two notaries acted there might either be one joint docket holograph of one of them, or two separate dockets, one by each, and both holograph. Assuming that the docket has been omitted, or is not holograph, or is otherwise defective, the question arises whether it can be cured, and particularly whether s. 39 of the 1874 Act applies. *Irvine's* case referred to an *inter vivos* deed; *Campbell's* to a will. In both it was held that the error could not be remedied. In *Irvine* it was said, with reference to the attempted use of sec. 39, that if the attempt was to prove that the notary signed the docket, that would be futile, for the docket must be holograph; and if it was to prove that the deed was "subscribed by the granter," that was impossible, for it was subscribed by the notary. In *Campbell's* case it was proposed to support the will by obtaining a new and holograph docket from the justice of peace who had acted; but this was rejected, because (1) the execution must be in presence of the granter, and (2) it is incompetent to make a will for a person after his death.

*Signatures*.—Prior to 1874 it was not essential that the docket should be signed (*Cullen*, 1731, Mor. 16842; *Gordon*, 1765, Mor. 16818; *Skinner*, 1883, 11 R. 88). But of course that would not apply to a joint docket of two notaries, holograph of one but not signed by the other. Under the 1874 Act the docket must be signed both by the notary and witnesses; and it is thought that the witnesses as well as the notary must, in addition, sign the deed, that is, that they must sign both deed and docket separately. The notary signs both deed and docket simply with his own name, adding "N. P." or "notary public" to his signature to the deed, and notary public to his signature to the docket. The testing clause runs exactly as if the granter of the deed had himself signed, and takes no cognisance of the fact of notarial execution.

The notary must have no interest in the deed (*Gormock*, 1583, Mor. 16874; *Ferric*, 1863, 1 M. 291). It has been held that the same notary may not act for opposing parties to a contract (*Craig*, 1610, Mor. 16829), but this has been held not to apply to a mutual will by two parties, revocable by either (*Gracie*, 1868, 7 M. 14); in which case doubt was thrown on the earlier judgment. The view indicated was that there was no statutory

nullity, though under certain circumstances the fact might be entitled to weight.

While blind persons may, if they choose, execute their deeds notarially, they are, in their option, entitled to subscribe for themselves, like any other person. If they adopt the former method, all the rules regulating notarial execution will apply: but in the latter case it is not necessary that the deed be read over to the grantor, though under the circumstances that is a very proper step. The reading is not in the least necessary in point of solemnity, but the want of reading may be important on an entirely different matter, viz. understanding and consent (*E. Fife*, 1823, 1 Sh. App. 498; *Ker*, 1837, 15 S. 983).

The following is an articulate statement of what ought to be attended to in cases of notarial execution, so as to avoid even the possibility of question:

1. Grantor, notary, and witnesses meet together, and all remain till everything is done and completed.

2. The whole deed, with anything annexed which is to be signed, is read aloud *verbatim* by the notary or one of the witnesses, or anyone else. If the grantor is deaf, see p. 410.

3. The notary asks the grantor whether he is able to write, and obtains answer in negative.

4. The notary asks the grantor the cause of inability to write, and gets sufficient answer.

5. The notary asks the grantor whether he desires and authorises him (the notary) to execute the document on behalf of the grantor, and gets answer in affirmative.

6. The notary signs each page with his own signature, adding "notary public," or "N. P."

7. The witnesses sign the last page.

8. The testing clause ought to be filled up then and there, for the docquet refers to the witnesses as "above named and designed."

9. The notary writes his holograph docquet in strict accordance with Sched. I of 1874 Act, and signs it, adding "notary public."

10. The witnesses sign the docquet.

[Menzies, 106; Bell, *Convey.* 39; Dickson, *Evidence*, 417.]

#### SPECIAL IMPOSITION AND RELAXATION OF SOLEMNITIES.

Within certain limits it is allowable to create self-imposed solemnities and to dispense with those which the law enjoins. The leading case usually quoted is *Nasmith* (1821, 1 Sh. App. 65). A Scotch-Indian, on his return, executed a will which bore to be signed and *sealed*. When found, there was no seal: a piece had been *cut* away, on which the seal had presumably been affixed: but the document was signed and duly tested. It bore upon it several alterations and notes in pencil and red ink, indicating an intention to make a new will. The House of Lords, reversing the judgment of the Court of Session, refused effect to the will. The case is thus not exactly in point on the question whether failure to put on the seal would have prevented the will taking effect, though that view was indicated. But see *Yeats* (1833, 11 S. 915), where a holograph deed was sustained though witnesses had been invoked and their attestation was defective. And, in any case, would the rule apply to an onerous *inter vivos* deed which has been acted on?

Special provisions in the constitutions of companies are presumed to be for the benefit and in the option of the company (Dickson, 449, and cases cited).

The cases in which it has been held permissible to relax the requirements of the general law are based upon the principle of adoption. Thus a testator in a will, executed according to law, may lay down his own rules as to the form and formalities which shall allow codicils thereto to receive effect, provided they are such as will admit of practical application (*Wilson*, 1861, 24 D. 163; *Young*, 1864, 3 M. 10; *Crosbie*, 1865, 3 M. 870). And *à fortiori* the same will apply to *prior* informal documents identified and adopted in a formal deed.

[*Bell, Convey.* 84; *Dickson, Evidence*, 447.]

#### HOLOGRAPH WRITINGS.

It is the privilege of holograph writings that they do not require witnesses. Nor even before 1874 was it a solemnity that the writer should be named, *i.e.* that the deed should expressly bear to be holograph; and apparently neither do the other statutory solemnities apply (*Cranston*, 1890, 17 R. 410—last page only signed; *McLaren, Wills*, 276).

In order that a deed may be effectual without witnesses, it is not necessary that it be *verbatim* holograph. It is enough if the essentials are in the grantor's writing (*Christie*, 1870, 8 M. 461; *Maitland*, 1871, 10 M. 79). As to what are the essentials, see *Macdonald* (1890, 18 R. 101). That was the case of a printed form of will, purchased by the testator, who filled up the blanks and signed without witnesses. The printed matter included the words of conveyance and the property conveyed; the beneficiary was named and designed in MS. *Held* that the deed was not holograph; dissenting *Ld. McLaren*, who expressed the view that the Scottish Statutes on the subject of authentication did not apply to such a document. See also *A's Executors v. B.*, 1874, 11 S. L. R. 259.

A document can be holograph of one person only; and if written by one and signed by him and others, it will not bind the latter, and it may or may not bind the writer, according to its nature (*Miller*, 1835, 13 S. 838; *McMillan*, 1850, 13 D. 187). In the latter case a mutual will was sustained as regards the estate of the writer. A document, holograph of one of the partners of a firm, and signed by him with the firm's name, binds the firm, if within a partner's powers (*Nisbet*, 1869, 7 M. 1097).

After a certain amount of fluctuation in judicial opinion, it is now held that a holograph writing must be subscribed, even though the grantor's name is set out at the beginning in his own handwriting. In *inter vivos* contractual deeds *rei interventus* may operate; but the rule as stated is now fixed with reference to testamentary writings (*Skinner*, 1883, 11 R. 88; *Goldie*, 1885, 13 R. 138).

Holograph deeds are not probative (*Cranston, supra*). They certainly are not if they do not bear *in gremio* that they are holograph. In that case the party claiming under the deed is bound and entitled to prove that it is holograph, which was of the nature of an exception to the rule that condescendences to support improbate deeds were not allowed after 1681 and before 1874. And it is not enough to prove that the deed and signature are in one handwriting; it must be proved that it is the writing of the alleged grantor (*Anderson*, 1850, 20 D. 1326; *affd.* 3 Macq. 180). If, on the other hand, there is an express statement *in gremio* that the deed is holograph, the onus is on the challenger (*Waddell*, 1845, 7 D. 605). The general rule is that holograph writings do not prove their own dates, with two exceptions: (1) acknowledgments of intimations of assignations (*Earl Selkirk*, 1708, Robertson's App. 1), and (2) testamentary writings (1874 Act, s. 40). This last point became of much less importance on the abolition of



the law of deathbed in 1871. All holograph writings containing or importing an obligation fall under the vicennial limitation introduced by the Statute 1669, c. 5. The effect is that, after the lapse of twenty years from the date of the document, the authenticity of the writing and subscription must be proved by the oath of the debtor or his representative.

[Ersk. iii. 2. 22; Menzies, 132; Bell, *Convey.* 78; Dickson, *Evidence*, 453; M'Laren, *Wills*, 287.]

#### TESTAMENTARY WRITINGS.

A will of moveable property, executed according to the law of the place of execution, is effectual here at common law (*Purvis*, 1861, 23 D. 812). This was confirmed by Statute (24 & 25 Vict. c. 114) as regards the wills of British subjects. That Act provides—

1. The will of a British subject made out of the United Kingdom is effectually executed, as regards personal estate, if made according to the forms of (1) the place of execution, or (2) the testator's domicile at the time of execution, or (3) the part of the British Empire where he had his domicile of origin.

2. The will of a British subject made within the United Kingdom is effectually executed, as regards personal estate, if made according to the forms of the place of execution.

3. No change of domicile after execution revokes the will or affects its construction.

The Act is limited in two respects, for it applies only to wills (1) of British subjects, (2) dealing with personal property. As has been stated, the common law is wider so far as regards the first restriction, and the second has been removed by Statute (31 & 32 Vict. c. 101, s. 20). It is provided that any testamentary writing shall effectually carry heritage if it (1) contains, "*with reference to such lands*," any words which would be sufficient in the case of personal estate, and (2) is executed "in the manner required or permitted in the case of *any* testamentary writing by the law of Scotland." Accordingly, Scottish heritage may be effectually carried under a will made in any country of the world according to the forms there used in the execution of wills, provided the intention appear to carry Scottish heritage, or the testator's whole estate without exception (*Connel*, 1872, 10 M. 627; *Studd*, 880, 8 R. 249; *Brown*, 1890, 20 S. L. R. 76). Suppose the law of the place of execution prescribes different forms for wills of real and personal estate respectively, that the latter only have been adopted, but that the intention is clear to convey Scottish heritage—*quid juris* here?

See further, Holograph Writings, *supra*.

#### OTHER PRIVILEGED DEEDS.

These include—

1. Crown writs. It appears that the Statutes do not apply to these writs (*Catton*, 1874, 1 R. 488). As to charters of *novodamus* from the Crown or Prince, see sec. 88 of the 1868 Act; and as to the sovereign's private estates, 25 & 26 Vict. c. 37, s. 6.

2. Foreign deeds made out of Scotland, and valid according to the laws and forms of the place where they are signed, are allowed effect here (Ersk. iii. 2. 39). But this does not extend to actual *inter vivos* conveyances of Scottish heritage (*E. Dalkeith*, 1729, M. 4464), though it does apply to

contracts for sale of such estate (*Cunninghame*, 1706, M. 4462). *Quære*, whether it includes a factory and commission giving power to convey heritage?

3. Writs in *re mercatoria*. These include "all the variety of engagements, or mandates, or acknowledgments which the infinite occasions of trade may require." The privileges of such writings are: they require no witnesses: they enjoyed immunity from the other statutory solemnities while these remained in force: they may be signed by initials or by mark: and they prove their own dates, at least for their own proper purposes (Bell, *Com.* i. 342).

4. Bills, promissory notes, and cheques have the same privileges, whether in *re mercatoria* or not: but to warrant summary diligence, bills and notes must be dated and signed.

5. *Quasi-judicial* writs. In this class prorogations of submissions (*Gordon*, 10 Dec. 1812, F. C.), devolutions to oversmen (*Kirkaldy*, 16 June 1809, F.C.), decrees of judicial referees, and opinions of counsel on joint memorials (*Fraser*, 1850, 7 Bell's App. 171) are effectual without the statutory solemnities.

6. Deeds by companies under the Companies Acts. The 1874 Act, s. 56, provides that any deed may, after 1 October 1874, be validly executed on behalf of any company registered under the Companies Acts, by being sealed with the company's seal, and signed by two directors and the secretary, with or without witnesses. It is to be observed that deeds executed under this authority without witnesses will be outside the relief available under sec. 39 of the 1874 Act, for it is limited to deeds "bearing to be attested by two witnesses."

7. Special statutory relaxations. Many Acts of Parliament, both public and private, allow documents to be attested by one witness. Among these are the Companies Acts and the Merchant Shipping Acts. The Marriage Notice (Scotland) Act, 1878, authorises writs thereunder to be executed by mark (41 & 42 Vict. c. 43, s. 16).

8. Deeds not "of great importance." It has been laid down that the statutory solemnities are not required in deeds relating to personal property only, and involving not more than £100 Scots (Ersk. iii. 2. 10-13).

[*Menzies*, 135; Bell, *Convey.* 88; Dickson, *Evidence*, 452.]

**Deer.**—The hunting of deer appears to have been regarded by Stair as *inter regalia* (Stair, ii. 3. 68), but this view is not borne out by the other institutional writers (Ersk. ii. 1. 10). It has now been definitely decided (*D. of Athole*, 1862, 24 D. 673) that Stair's opinion is erroneous. In that case the Court decided that a Crown vassal, infest in a royal forest, is not entitled to go on land of a neighbouring proprietor in pursuit of deer which have strayed from the forest, or to prevent the neighbouring proprietor from shooting deer within his own march. The more recent case of *Hemming* (1883, 11 R. 93), decided that the reservation by a subject-superior of right to all deer on the lands granted does not confer a right of hunting or stalking deer over them. The only two modern Statutes which would appear to afford protection to deer are the Day Trespass Act, 2 & 3 Will. IV., and the Game Licence Act, 23 & 24 Vict. c. 90, although an abortive attempt was made in 1885 to include deer in the Ground Game Act of 1880, so far as the tenant of cultivated land was concerned. Any further restrictions on the killing of deer must be looked for in Statutes of a very much older date, and of a class now generally considered in desuetude. A considerable number of enactments are extant, dating from 1551 to 1600,

which restrict the *manner* of taking deer, impose fines on the buyers and sellers of venison, and declare anyone killing deer in the park or enclosed place of another to be guilty of theft (see also Hume, i. 82): but, up to the end of the seventeenth century, it would appear that the taking of deer in unenclosed places was not a crime, except in so far as the manner of killing might constitute an offence against one of the minor Statutes above mentioned. The last and most important of the series of enactments prior to 1790 is c. 31, 1621, which restricts hunting and hawking to those in possession of a ploughgate of land. This Act has been several times held to be not in desuetude, and its principle is extended by the case of *Breadalbane* (Mor. 4999; affd. 1791, 3 Pat. 222), which decides that a proprietor is entitled to interdict anyone from killing game on his unenclosed lands.

The law stands thus:—

1. Deer are included in the Game Licence and Day Trespass Acts.
2. The destruction of deer at any time, even on unenclosed lands, may be met by interdict.
3. The destruction of deer at any time, without the permission of the proprietor, by a person not possessed of a ploughgate of land, is an offence against the Act of 1621, c. 31 (see *Journal of Jurisprudence*, xxix. p. 292).

**Defamation.**—Defamation is literally the taking away of reputation. In law the term is most generally applied to the uttering of statements, either orally, or in writing, or in print, injurious to the reputation of persons. But there may be defamation of the quality of goods, or of the title to them, whereby the owner thereof suffers injury. And defamation may be effected, not merely by words, but by pictures, statuary (*Monson*, L. R. 1894, 1 Q. B. 671), and signs, or by acts. The law acknowledges reputation as a valuable possession, and therefore the taking of it away is as illegal as theft. Defamation thus entitles its victim to a legal remedy, and this remedy is now, in Scotland, solely by action for damages, except in the case where the defamatory statement is made of a candidate at a parliamentary election, when it is punishable as an illegal practice, and in the case where the act of defamation has not taken place, but is anticipated, when interdict is in certain cases competent to prevent its taking place. Formerly a quasi-criminal remedy could be obtained, by those who had suffered from defamation, in the Commissary Courts. Damages, a fine, and a palinode could be concluded for. But this remedy has fallen entirely into desuetude. In the following statement of the law, for convenience' sake, defamation will be spoken of as if effected solely by words, it being understood that the same rules apply *mutatis mutandis* when it is effected in the other ways above mentioned.

It may be broadly stated that any repute which a person, or his possessions or productions, possess, and which has an appreciable monetary value, is protected by the law, though in different degrees, against defamation. The repute most usually defamed is the moral reputation of individuals, and this is the one which the law most strictly protects; but people are also protected against imputations which will tend to affect their social status, or on their financial condition, their fitness for their vocation or profession and their conduct in pursuing it, their mental and bodily condition, their title to their property, the quality of their goods, their public position, and even against imputations on others by which those who sue can prove they have suffered. The following cases

will exemplify this general statement, and will show in what circumstances, and to what extent, the law will protect against the various kinds of imputation:—

*Defamatory Imputations.*—(a) Any imputation against a man's moral character is actionable (L. J. C. Inglis, p. 485, *Brownlie*, 21 D. 480). Thus, it is defamatory to say that a person has committed adultery (*Rankine*, 21 D. 1057), or has cheated (*Smith*, 6 D. 565), or has made false balance-sheets (*Martin*, 1 S. L. T. 499), or has lied (*Milne*, 21 R. 155), or has pretended to be someone else in order to deceive the public (*Johnstone*, 2 R. 836), or makes a livelihood by swindling (*Drew*, 24 D. 649), or has committed fornication (*Watson*, 24 D. 494), or is the parent of an illegitimate child (*Stephen*, 3 M. 571), or seeks to seduce girls (*Milne*, 20 R. 95), or to call a woman a whore (*Allan*, Hume, 639). All accusations against persons that they have committed offences against the laws, provided at anyrate that the offences are punishable with imprisonment, are to be treated as charges of immorality, and are defamatory. Thus it is defamatory to say that a person keeps a brothel (*Fraser*, 13 D. 289), has been guilty of conspiracy (*Nelson*, 4 M. 328), has embezzled (*Muckie*, 13 D. 725), has been guilty of fire-raising (*Watsons*, Hume, 624), has committed forgery (*Ingram*, 20 R. 771), has obtained money on false pretences (*Macleod*, 18 R. 811), has committed murder (*Paul*, 11 R. 460), perjury (*Gray*, 15 S. 1296), or rape (*Finlay*, M. 3436), has poached (*Brownlie*, 21 D. 480), poisoned (*Reid*, 19 R. 775), or committed sodomy (*Richardson*, Hume, 623), has been guilty of sedition (*Lowc*, 7 D. 247), or shebeening (*Cook*, 29 S. L. R. 247), or has committed theft or robbery (*Rose*, 9 D. 12; *Moore*, 20 R. 712). It seems doubtful whether a false accusation against a person of having committed a mere police offence, for which the only penalty is a fine, and where there is no element of immoral action apart from the mere breaking of the law, will found an action for defamation. In England, it would seem that it is not slanderous to accuse a man of an offence punishable only by fine (per Pollock, B., *Webb*, 11 Q. B. D. 609). But the English law is complicated by its distinction between slanderous, *i.e.* spoken defamatory words, and libellous, *i.e.* written or printed defamatory words, and it does not appear whether an accusation of a police offence merely punishable by fine would, if uttered in writing or print, be held libellous. A charge of immorality need not be specific in order to entitle the person against whom it is made, to recover damages for defamation. Rightly or wrongly, it has been expressly held that general charges and epithets which involve immoral conduct are to be held as defamatory, and give good ground for action (per L. J. C. Inglis, *Brownlie*, 21 D. 480). Thus it is defamatory to call a person a bad lot (*Green*, 6 R. 318), a blackguard (*Brownlie*, 21 D. 480), a disgrace (*Newlands*, 12 S. 550), a rascal (*Harkes*, 24 D. 701), a scoundrel (*White*, 10 D. 332). And even words which do not involve moral turpitude, but merely attribute qualities or acts to persons which are generally regarded as reprehensible, are defamatory. Thus it is actionable to say a man is of brutal character (*Croucher*, 16 R. 774), or to hold him up to discredit and contempt (*Lowc*, 7 D. 117), to say a man's conduct is dishonourable (*Macrae*, 16 R. 476; *Brace*, 19 R. 482), but it is not actionable merely to say a particular act is dishonourable (*Turnbull*, 19 R. 154). It is also actionable to say that a man's conduct is treacherous (*Menzies*, 13 S. 1136; *Grierson*, 43 Sc. Jur. 190), or that he is a coward (*Russell*, 15 S. 881), or that he is a scoffer at religion (*Macfarlane*, 14 R. 870), or is a designing person (*Henderson*, 17 D. 348), or is a hypocrite (*Brown*, Hume, 640), or to say he has uttered a libel (*Home*, 10 S. 508; *Milne*, 20 R. 95), or been

guilty of oppression (*Herdman*, M. 13987), or is a plagiarist (*Leslie*, 3 Murray 157).

(b) Words which impute a social offence are defamatory (see *Ld. M'Laren, Milne*, 20 R. 95). The injury to the person about whom such words are used is that they tend to affect his social status. Many of the imputations last mentioned under the head of imputations on the moral conduct, could also be classed under this. In addition to those instances, it may be noted that it is defamatory to charge a man with blasphemy (*Danbar*, 11 D. 587), to call him a calumniator (*Russell*, 15 S. 881), to say he is disloyal (*Love*, 7 D. 117), or destitute of the feelings of a gentleman (*Mackay*, 11 S. 1031), or that he is a common informer (*Graham*, 13 D. 634).

(c) Imputations on a person's financial condition are actionable if they amount to statements that he is insolvent, or financially in such a bad condition that it is not safe to have business dealings with him. Obviously such imputations, though false, may bring to the person about whom they are made the financial embarrassment which they state already exists, and the person may thus be most grievously injured both in public esteem and in his business. The law therefore allows persons against whom such imputations have been falsely made, the right of obtaining damages. Thus, it is defamatory to say that a man is bankrupt (*Outram*, 14 D. 577), or has been (*Bruce*, 19 R. 482), or shortly will be so (*Anderson*, 18 R. 467). And it is actionable to say that a man is in financial difficulties (*Wright*, 16 R. 1004), or has no means (*Macrae*, 16 R. 476). But merely to say that a person is poor is not *per se* actionable (*M'Laren*, 21 D. 183).

(d) Statements that a person is unfit for his vocation or profession, or that he has acted improperly when following it, are actionable, as they may seriously injure him in the eyes of possible patrons or clients, and deprive him of their support. Thus, it is defamatory to say that a professional man is unfit for duties which fall within the scope of his profession (*Oliver*, 3 S. L. T. 163; *M'Kerchar*, 19 R. 383; *Auld*, 2 R. 940), or that he has neglected his duties (*Hill*, 19 R. 377), or that he has acted improperly in the performance of his duties (*Richardson*, 7 R. 237). It seems doubtful whether a charge of unfitness against a business man, from whom the law requires no standard of proficiency before he is permitted to follow his trade, is *per se* defamatory (*Buchan*, 20 D. 222). But a charge of failure to conduct his business properly may be actionable. Thus, to say of a farmer that he neglects his farm, and does not cultivate it properly, is defamatory (*Dun*, 4 R. 317; *M'Kendall*, 3 S. L. T. 295). So, also, it is actionable to say that an innkeeper keeps a dirty or disorderly hotel (*Kearney*, 5 D. 407; *M'Iver*, 11 M. 777). On the other hand, a distinction must be drawn between definite though general charges against persons of being unfit for their profession, and criticism on the manner they perform its duties. Thus, it is not defamatory of a singer to say that she is unsuited for her part (*Crotty*, *Glegg on Reparation*, 501), but any criticism which involves an accusation of improper behaviour in the performance of duties is defamatory. Thus, to charge a law agent with conducting cases for his own advantage and without regard to the interests of his clients is actionable (*M'Rostie*, 12 D. 74).

(e) It is defamatory to falsely say of a person that he is insane (*Mackintosh*, 2 R. 877), or that he is suffering from such diseases as are likely to make him shunned by his fellow-creatures (*Bloodworth*, 7 Man. & G. 334). The reason for allowing persons damages for such accusations, seems to be that they are entitled to the society of their fellows, and that it is a wrong to say anything which will tend to unjustly deprive them of that society.

Of course, the imputation that a person is suffering from a venereal disease is defamatory, on the other ground that it suggests that he is of immoral character.

(f) It is actionable to falsely say that a person is not the owner of what he is seeking to sell (*Philip, Hume*, 865; *Banister*, 4 Rep. 17), unless the person making the statement is *bonâ fide* claiming the thing for himself or on behalf of others. This is known as slander of title. Instances of this kind of wrong are very scarce in Scotland, but in England, where the cases are more frequent, it seems to have been established that the person complaining of slander of his title must prove that the statement was false, that it was uttered without just occasion, and that it has caused special damage (Odger, 3rd ed., 148; *Ld. Low, Harpers Ltd.*, 4 S. L. T. 116). By sec. 32 of the Patents Act, 1883, if any person claiming to be a patentee makes threats of legal proceedings against another for alleged infringement, any aggrieved person may apply for and obtain interdict and damages against the person using the threats, if the alleged infringement was not in fact an infringement of the legal rights of the person making the threats.

(g) False statements uttered without lawful occasion, and causing injury to the owner, about a person's merchandise, seem to be a sufficient ground for an action of damages. It is true that in one Scots case it was held not to be defamatory to say of a baker's bread that it was poisonous and not fit for human food (*Broomfield*, 6 M. 563); but with this must be contrasted the cases of *Macrae*, 13 R. 732, and *Hamilton*, M. 13923. In England, the law appears quite settled in favour of such statements being actionable (*Western Counties, etc.*, L. R. 9 Ex. 218). But it must be noticed, that merely saying one's own goods are the best is not an actionable wrong to another in the same trade (*White*, L. R. [1895], App. Ca. 154).

(h) Statements by which persons are held up to public hatred and contempt are actionable, and entitle the person complaining of them, if he proves their effect, to damages (*Cunningham*, 6 M. 926; *M'Laren*, *Glegg on Reparation*, 497). But a mere holding up to public ridicule is not actionable (*M'Laughlan*, 22 R. 38). The law of Scotland on this matter is in an unsatisfactory position. It would seem, on the one hand, perfectly just that a person should have a remedy in damages for false statements which have been made by another without lawful occasion, and by which the person complaining of them has been injured (*Paterson*, 20 R. 744). On the other hand, it seems erroneous in such a case to ask the jury whether the statements complained of exposed the pursuer to public hatred and contempt. The questions to be asked of the jury are those points which, if proved, constitute the wrong. These three points are, whether the statements were false, were uttered without lawful occasion, and did injury to the pursuer. It may be sound law to render a man liable in damages for having exposed another to public hatred and contempt,—which is something else than having, in the ordinary sense of the word, defamed him,—but it seems more consonant with the constitutional privilege of liberty of speech that a person should be allowed to say what he likes of another, however odious it may make the other, provided he keeps within the bounds of truth. On the other hand, it seems quite just that a person should be liable in damages for uttering false statements, without any lawful occasion for them, and causing injury to others.

(i) It is sometimes an actionable wrong to A. to say something defamatory of B. *Ld. Deas* pointed this out in the case of *North of Scotland Bank*, 19 D. 881, which was a typical case of the kind. There the bank sued a

person who had said that certain members of the committee of management had helped themselves to funds of the bank through the connivance of other members. The bank averred injury to its credit by this statement, and the action was held relevant. And when the defender had imputed immorality to the pursuer's wife, the pursuer was held entitled to sue, on the ground that he could recover for injury done to his trade by the imputation (*Riding*, L. R. 1 Ex. D. 91).

*Innuendo*.—It frequently happens that pursuers come into Court complaining that words have been used about them which appear innocent, and do not seem to be defamatory. In this case the pursuers require to put on the words used a meaning which is undoubtedly defamatory. The defamatory meaning put upon words not *ex facie* defamatory is called the innuendo. There are two classes of words requiring an innuendo. *First*, words which have double or ambiguous meanings, one of which is defamatory, the other not. When such words are complained of, the pursuer has only to aver that the words were used in their defamatory meaning (*Rodgers*, 10 D. 882). *Second*, words which in their ordinary acceptation are of innocent meaning. These require not only to be innuendoed, but facts and circumstances must be averred on record from which, if proved, the jury may infer that the words were used in their defamatory sense (*Brydoun*, 8 R. 697; *Capital, etc.*, L. R. 7 App. Ca. 741). The Court will not allow a case to go to trial where words *ex facie* innocent or of ambiguous meaning have been used, unless an innuendo is put on them, and the Court is the judge whether the innuendo is, in the circumstances, alleged by the pursuer, a reasonable one or not (Id. Wood in *Mullar*, 15 D. 170). If the Court is of opinion that the innuendo is not a reasonable one, it will not allow the case to go to a jury, because, if the jury found for the pursuer, the Court would have to reverse the verdict, on holding the words could not reasonably bear the construction put on them by the pursuer (Id. Adam, *Wagh*, 21 R. 326).

*Privilege*.—In certain cases the law protects persons who have used defamatory words, from liability for having done so. This protection is called privilege. Privilege is said to be either absolute or qualified. Absolute privilege protects the utterer of the defamatory statement complained of, from liability to the injured party, no matter what the injured party can prove. Qualified privilege protects the utterer of the defamatory statement complained of, from liability in damages, unless the injured party proves that the words were uttered maliciously, and, in certain cases, without probable cause.

*Absolute Privilege* is usually applied to the complete protection afforded by law to any utterances made by persons in certain public positions. Action is denied to persons who seek damages for statements uttered by persons in those positions. The utterances thus protected are those of Members of Parliament (*Dillon*, 20 L. R. Ir. 600) made in Parliament, of petitions to Parliament (*Kane*, Ir. R. 2 C. L. 402), of judges (*Haggart's Trs.*, 2 Sh. App. 125; *Harvey*, 4 R. 265; *Robertson*, 4 W. & S. 102) when acting as such, counsel (*Williamson*, 17 R. 905) when acting as such before the Courts, witnesses (*Mackintosh*, 2 R. 877) giving evidence in Court, and jurymen (*Royal Aquarium*, L. R. 1892, 1 Q. B. 431) when acting as such. Not only are the judges of secular Courts absolutely privileged in their statements when acting as such, but the members of Ecclesiastical Courts, when exercising their judicial functions in matters properly within their jurisdiction, have the same privilege (*Porteous*, M. 13937; *Dunbar*, 12 D. 284; *Sturrock*, 11 D. 1220). And even the courts of Dissenting Churches

and other Voluntary tribunals are absolutely privileged in statements made by them within the scope of their powers, and with regard to persons who have submitted themselves to their jurisdiction (*Thallon*, 18 D. 27). Judges of Military and Naval Courts also enjoy the privilege (*Dawkins*, L. R. 7 H. L. 744). Reports printed by order of Parliament are absolutely privileged (3 & 4 Viet. c. 9). Contemporary reports of debates in Parliament and of proceedings in law courts, if fair and accurate, are absolutely privileged (*Wason*, L. R. 4 Q. B. 73; *Macleod*, 20 R. 218). A person is absolutely privileged who publishes accurately the contents of public registers (*Newton*, 6 Bell's App. 175; *Taylor*, 15 R. 608). It has been said that the Lord Advocate is absolutely privileged in what he does in performing his duties (per Ld. Young, *M'Murphy*, 14 R. 725); and there is no reason to doubt this is so.

*Veritas*.—The truth of a defamatory statement is, if proved, an absolute bar to the person complaining of the statement obtaining damages (*Macdonald*, 17 F. C. 327; *Mackellar*, 21 D. 222; *Buchan*, 21 R. 379). All persons are entitled to say what is true, and truth may therefore be treated as a form of absolute privilege. A person pleading *veritas* as a defence must prove the truth of the precise statement complained of, and not of some other (*Gibson*, 3 Murray, 208; *M'Kennal*, Hume, 628). If the statement complained of is a general accusation of a defamatory character, the defender in his defence must set forth specific instances, which, if proved, would justify the general statement (*Hunter*, 21 R. 850). A person may plead that he never uttered the statement complained of, and that if he did it was true (*Mason*, 13 D. 1347).

*Qualified Privilege* exempts persons who do not enjoy the higher or absolute privilege, from liability for defamatory statements uttered by them when occupying certain positions, or when uttering them on certain occasions, or when making certain classes of statements, unless the persons complaining can prove that the statements were uttered maliciously, and, in certain cases, without probable cause. Thus, persons in official positions are privileged in their statements made, pertinently or relevantly, to matters within their duties (*M'Lean*, 16 R. 175; *Grant*, 12 S. 385; *M'Bride*, 7 M. 427; *Craig*, 3 R. 441; *Beaton*, 14 R. 1057). So, too, are persons when litigating, if they make statements pertinent or relevant to the subject of litigation (*Selbie*, 18 R. 88). And persons speaking in accordance with their rights or duties as citizens have a qualified privilege. Thus, an elector discussing a candidate for his district is privileged (*Bruce*, 19 R. 482), and a citizen giving information of crime to the proper authorities is privileged (*Hassan*, 12 R. 1164). Persons who are, or have been, in the position of masters to others, are privileged in the characters they may give of the latter to persons interested to know (*Watson*, 24 D. 494). It would seem, too, that wherever one person has an interest or duty to reveal something to another, who has an interest or duty to learn it, the former is privileged (*Loughton*, L. R. 4 C. P. 495), and the mere fact that a person has an interest in the welfare of another may be sufficient to give the former a privilege when speaking to the latter about a third party (*Milne*, 20 R. 95).

*Criticism*.—The so-called privilege of criticism is properly no privilege at all. Every person has a right to discuss other people's work and actions, and such discussion, though hostile, is not defamatory. Criticism is therefore permissible, and does not render the critic liable as for defamation, unless the criticism involves charges against the criticised of a defamatory nature, as those are explained above. "There is no



privilege when, instead of commenting merely on the opinions in a publication, or arguing against them, an opponent takes occasion to calumniate the author" (*Adam*, 3 D. 1058). It is generally a jury question whether a criticism is fair or is defamatory, but in perfectly clear cases the Court will decide the matter (*Gray*, 17 R. 1185).

*Fair Report.*—A correct and fair report of a matter itself privileged is privileged. Thus, a fair report of proceedings in a law court is protected (*supra*, *Absolute Privilege*). But it seems that the privilege extends further, and that fair reports of matters of public concern enjoy a privilege. In England, this is so by Statute (51 & 52 Vict. c. 64). In Scotland, there is no Statute and but little decision; but the cases of *Finlay* (M. 3436) and *Furishes* (Hume, 634) seem to support the proposition that fair and accurate reports (which do not require to be verbatim) of matters publicly transacted are privileged.

*Fair Retort.*—The law recognises that a fair retort, though it be severe, to an accusation or complaint, does not render the person making it liable in damages, so long as the retort does not reflect on the moral character of the person to whom it is made (*Gray*, 17 R. 1185). But the retort must not go beyond meeting the statement to which it is a retort (*Milne*, 21 R. 155).

*Malice and Want of Probable Cause.*—If there is any reason to suppose that a person is protected by privilege in a statement complained of by a pursuer, the latter should always aver on record that the statement was made maliciously and without probable cause. In all cases of proper qualified privilege the pursuer must show that the statement of which he complains was made by the defender maliciously. In certain cases he must show that it was made without probable cause. These must therefore be averred on record, or otherwise in privileged cases the record will not be relevant (*Fenton*, 5 D. 705). There are two classes of cases of qualified privilege where malice must be averred. *First.* Where the statement complained of is privileged because it was uttered in judicial proceedings, or by, or to, a public authority, it is not only necessary to aver malice, but to set out on record facts and circumstances from which, if proved, malice may be inferred (*Laidlaw*, 17 R. 394). *Second.* But in other cases of qualified privilege it is sufficient to aver malice, without setting forth the facts from which malice may be inferred to have existed. The malice that a pursuer requires to prove to have existed in the defender need not be deliberate animosity to him. Recklessness in the use of words, a disregard of the consequence of using them, constitute in law such malice as will render a person otherwise privileged liable (*Urquhart*, 3 M. 932). Thus, a person will in law be held to have spoken maliciously who utters defamatory words regardless of their effect. In actions against officials for statements made in the discharge of their duties (*Arbuckle*, 3 Dow 160), against persons who have made reports or complaints to the proper authorities (*Douglas*, 20 R. 793), and occasionally in actions against superiors for statements made of inferiors when there is a special legal relation between them (*Hill*, 19 R. 377), the pursuer must aver on record that the statement complained of was made without probable cause, as well as maliciously. In these cases, therefore, of qualified privilege, the pursuer requires to prove both elements before he can succeed. It is for the Court, not for the jury, to decide what facts will constitute a case of privilege (*Maclean*, 3 Murray 353). It likewise is for the Court to decide what facts amount to legal malice or want of probable cause. It is for the jury to find, on being told what malice and want of probable cause are, in law, whether they, or either of

them, existed in fact in the case before them (per *Ld. Ivory, Smith*, 15 D. 549).

*Issues.*—When actions for defamation are tried in the Court of Session, they almost invariably go before juries, to whom the question which they have to answer is presented in an issue. The issue, in its simplest form, asks whether the defender, at a specified time and at a specified place, in the presence of specified persons, falsely and calumniously made a specified statement about the pursuer, to his loss, injury, and damage. If the words complained of are not *per se* defamatory, the innuendo put upon them requires to be set out in the issue. And if the statement complained of is a long one, it is usual to quote it in a schedule, and refer to the schedule in the issue itself. If the case is one where the defender is privileged, the issue must ask not only whether the defender “falsely and calumniously” made the statement, but also whether he did it maliciously (and in the cases specified above, whether he did it without probable cause). Whether the defender is privileged or not is in the first place considered by the Court before granting an issue (*Ld. Medwyn, Fenton*, 5 D. 705). In judging whether there is privilege or not, the Court can only look to the pursuer’s averments (*Lockhart*, 14 D. 452). If it is not clear from them that the defender was privileged in making the statement complained of, the Court will grant a simple issue, omitting the words maliciously and without probable cause (*Reid*, 19 R. 775). If, when such an issue has been granted, it turns out at the trial that the defender was privileged, the pursuer may lead evidence of malice and (if necessary) of want of probable cause, if he has averred them on record (*Rankine*, 1 R. 225). If he has not, he will not be allowed to lead such evidence, and the defender will be entitled to a verdict in his favour (*Chiene*, 6 S. L. R. 62). Although a certain amount of latitude is allowed in the specification of time in issues (*Stephen*, 3 M. 571), they will be refused if the latitude proposed is much more than a month. With regard to the latitude permitted in the specification of the place where, and the persons to whom, the alleged defamatory statement was uttered, the cases of *Bisset*, 2 M. 1096; *Anderson*, 18 R. 467; and *Walker*, 6 M. 318, may be referred to.

*Counter Issues.*—If the defender pleads that the statement complained of is true, he must take a counter issue. If the defender has made a specific and particular charge against the pursuer, the counter issue simply asks if that accusation is true. If the defender has made a general charge against the pursuer, such as that he is a thief, the defender must set forth in his defences particular instances when the pursuer committed the thing charged, and in his counter issue must ask whether the pursuer committed it, and is what he is accused of being (*McDonald*, 24 D. 685). There is no necessity to set out in the counter issue the specific instances, but the defender in his proof will be restricted to proof of those mentioned in his record (*Hunter*, 21 R. 850). If the pursuer puts an innuendo on the words complained of, the defender must take a counter issue if he maintains the truth of the statement as innuendoed (*Torrance*, 7 M. 243). If he only maintains the truth of the statement in its *primâ facie* sense, he does not require to take a counter issue, but can prove the truth of it without doing so (*Russell*, 23 R. 75). A counter issue can be taken on any separable part of a statement complained of as defamatory, and its truth can be proved (*Mackellar*, 21 D. 222). It is competent for a defender to deny having uttered the statement complained of, and to plead its truth if he did (*Mason*, 13 D. 1347). Similar rules obtain as to the necessity for specification in counter issues as apply in issues.

*Interdict to prevent Publication of Defamatory Documents.*—This is rarely given (Ld. Cottenham in *Newton*, 6 Bell's App. 175; *White*, 8 R. 896). But when a party proposes to distribute a document which is obviously untrue and undoubtedly defamatory, interdict may be granted (*British Pearl*, 14 R. 818; *Monson*, L. R. 1894, 1 Q. B. 671). By the Patents Act, 1883, s. 32, any aggrieved person may obtain interdict against a person who, claiming to be a patentee, uses threats against another for alleged infringement, if the alleged infringement is not an infringement of the threatening person's rights. And by the Corrupt Practices Act, 1895, an interdict can be obtained against the repetition of any false statement about a parliamentary candidate's personal character or conduct.

*Defamation of Parliamentary Candidates.*—By the Act 58 & 59 Vict. c. 40, any person who, or the directors of any body or association corporate which, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, shall be guilty of an illegal practice within the meaning of the Corrupt Practices Act, 1883, and shall be liable to all the penalties for, and consequences of, committing an illegal practice. A person charged with an illegal practice is liable to be tried summarily and sentenced to a fine of £100, and is disqualified from being a voter for five years. A person is freed from liability if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true. See CANDIDATE, PARLIAMENTARY, SLANDER OF.

**Default.**—In judicial procedure, default arises from failure to comply with the rules and regulations of the Court. If either pursuer or defender infringes these rules, the Court may in all, and must in certain, cases grant decree by default (31 & 32 Vict. c. 100, s. 26). A decree by default is a decree *in foro*, and can only be got out of the way by reclaiming note or reduction (*Forrest*, 1875, 3 R. 15; *McKean*, 1877, 14 S. L. R. 274). The Court does not necessarily grant decree by default in cases where a party has failed to obtemper an order of the Court; it is only in extreme cases that it will go so far as this (Mackay, *Manual*, 310); but where a party has failed to conform to the provisions of a Statute, then the judge has no discretion (31 & 32 Vict. c. 100, s. 26). Where counsel are absent without good excuse, the judge must pronounce decree by default (A. S. 2 Nov. 1872). The party will not necessarily be reponed against this decree, even with the consent of his opponent (*Ferguson*, 1878, 5 R. 1016). If the reclaiming days have expired, and the decree by default become final, it can only be challenged by reduction, unless the days have expired from mistake or inadvertency, in which case "it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition (now by reclaiming note—*Bennet*, 1833, 11 S. 414) to the review of the Division . . .": payment of all previous expenses being a condition precedent to leave to reclaim being granted (48 Geo. III. c. 151, s. 16). This provision is applicable to cases in the Bill Chamber (*Plock*, 1841, 4 D. 271). When a Lord Ordinary refuses leave under the above section, it is doubtful whether a reclaiming note against this interlocutor refusing leave is competent (*Mags. of Leith*, 1875, 3 R. 152). A decree by default in the Inner House can only be set aside by appeal to the House of Lords (*Tough*, 1832, 10 S. 619). It is a matter for the discretion of the Court whether a party against whom a decree by default has gone out is to be reponed, and upon what

conditions (*Sutherland*, 1880, 18 S. L. R. 39; *Bainbridge*, 1879, 16 S. L. R. 284; *Anderson*, 1875, 3 R. 254). Reponing has been refused even on payment of full expenses (*Arthur*, 1866, 4 M. 841); on the other hand, it may be granted without payment of any expenses at all (*Gael Iron Co.*, 1884, 12 R. 345). A decree by default, being a decree *in foro*, comes under the heading of "Interlocutors disposing in whole or in part of the merits of the cause": it is not, therefore, affected by the Court of Session Act, 1850, 13 & 14 Vict. c. 36, s. 11, which declares that it shall be incompetent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiry of ten days from the date of signing the interlocutor, with the exception only of reclaiming notes against interlocutors disposing in whole or in part of the merits of the cause, and against decrees in absence. All interlocutors coming under the above two heads may be reclaimed against within twenty-one days. A decree by default is *res judicata*, so long as it stands. "I know of no case in which a decree by default has been set aside by the institution of a new action" (Ld. Curriehill in *Forrest*, 1875, 3 R. 15). As has been already said, such a decree can only be challenged by reclaiming note or reduction. Suspension of a decree by default is incompetent (*Muile*, 1878, 6 R. 44).

[Mackay, *Practice*, vol. i. pp. 586-587; Mackay, *Manual*, pp. 310-311, 624; Monteith Smith on *Expenses*, pp. 97-99.]

See DECREE; REDUCTION; RECLAIMING; REPONING; ABSENCE, DECREE IN; EXPENSES.

**Default (Sheriff Court).**—In the Sheriff Court decrees by default are regulated by two Statutes, the Sheriff Courts Acts of 1876 and 1853.

By the Act of 1876, 39 & 40 Vict. c. 70, s. 20, decrees by default are competent when a party to a defended action fails to appear at (a) a diet of proof (*Duff*, 1882, 9 R. 423; *King*, 1880, 17 S. L. R. 583; *Vickers*, 1877, 4 R. 729; (b) a diet of debate (*Robb*, 1877, 14 S. L. R. 473); or (c) other diet in the cause. In case of such failure, except when a sufficient reason appears to the contrary, the Sheriff must, and whether a motion to that effect has been made or not, pronounce either absolvitor, or decree, with expenses, as the case may require.

The expression "other diet in the cause" appears to mean other occasions on which appearance is obligatory by Act of Parliament or of Sederunt, and not every time that the other party chooses to enroll the case (see Dove Wilson, *Practice*, pp. 280, 281, and *Traill*, 1877, 14 S. L. R. 234).

By the Act of 1853, 16 & 17 Vict. c. 80, s. 6, where any condescendence or revised condescendence or other paper is not given in within the prescribed periods, the Sheriff must give decree in terms, or dismiss the action, as the case may be, unless he is satisfied that the delay is due to unavoidable or reasonable cause, in which case he may allow the paper to be received on payment of such sum of expenses as he thinks just. These provisions, in so far as they relate to condescendences and defences, revised or otherwise, are now practically obsolete, but they remain in force with regard to "other papers" or pleadings (see Dove Wilson, *Practice*, p. 279). Where, however, such papers deal only with particular points in the case, it is usual to hold the party failing to produce as confessed in so far as these points are concerned (A. S. 10 July 1839, s. 66), *c.g.* failure to produce documents (*Strachan*, 1870, 9 M. 116; *Caledonian Ry. Co.*, 1855, 17 D. 812).

It is to be observed that where the failure is on the part of the pursuer, the penalty by the Act of 1876 is absolvitor; by the Act of 1853 it is dismissal. Further, it seems competent for the party not in fault, should he wish to do so, to sue his case to judgment without taking advantage of the decree by default in his favour which might have been given had he so chosen (A. S. 10 July 1839, ss. 59 and 76; *Douglas*, 1855, 17 D. 434).

A decree by default is a decree *in foro*, disposing of the merits of the cause, and is appealable as such (*Mackenzie*, 1861, 23 D. 1201; *Boak*, 1860, 22 D. 1468; *Young*, 1859, 21 D. 1358. See APPEAL FROM SHERIFF-SUBSTITUTE TO SHERIFF, and APPEAL FROM SHERIFF COURT TO COURT OF SESSION.)

On appeal it is a matter for the discretion of the Court whether or not a party shall be reponed against a decree by default (*Arthur*, 1866, 4 M. 841; *Anderson*, 1875, 3 R. 254; *Sterenson*, 1885, 12 R. 923). If reponed, it is on such conditions as to expenses as the Court thinks will do justice in the circumstances, *e.g.* *Rutherford*, 1826, 4 S. 755. A party will not be reponed a second time without very sufficient cause shown (*Pearson*, 1866, 4 M. 754; *Mather*, 1858, 21 D. 24; *Hamilton*, 1857, 19 D. 712). And if the Sheriff-Principal declines to repon, the Court of Session is chary of interfering with his discretion (*McGibbon*, 1877, 4 R. 105).

[Dove Wilson, *Practice*, pp. 278–283; Mackay, *Manual*, pp. 310–311; Bell, *Dictionary*, *h.t.*]

**Defeasance.**—The English term “defeasance” has crept into Scottish legal phraseology in relation to the law of vesting. The word is derived from the French *défaire* (to defeat or undo), and in English law language signifies (1) “a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone” (Blackstone’s *Com.* ii. 280, Kerr’s ed.); and (2) “in a bond, or recognisance, or judgment recovered, a condition which, when performed, defeats or undoes it, in the same manner as a defeasance of an estate before mentioned” (*ibid.* 296). “As I have always understood, a ‘defeasance’ is something which defeats the operation of a deed or document. If it is contained in the same deed it is called a condition” (per Jessel, M. R., in *re Storey*, *ex parte Popplewell*, 52 L. J. Ch. 39, at p. 42. Cp. Touchstone, 396. See Tomline’s *Law Dictionary*, *h.t.*; Sweet’s *Law Dictionary*, *h.t.*; Stroud’s *Judicial Dictionary*, *h.t.*; Wharton’s *Law Lexicon*, *h.t.*). In succession where payment or distribution is postponed, a question may arise as to the period at which in the particular case a legacy or bequest vests. It may vest absolutely *a morte testatoris*; or vesting may be altogether postponed depending on some contingency; or there may be *vesting subject to defeasance*—there may, *i.e.*, be present vesting subject to future divesting on the occurrence of an uncertain event. See VESTING.

[McLaren, *Wills and Succession*, ii. 813 *et seq.*; Rankine’s *Ersk. Prin.*, 19th ed., 507.]

**Defences** are in the form of answers to the pursuer’s condescendence, and either admit, deny, or explain the facts stated. The defences should contain no argumentative matter, nor facts irrelevant to the pleas in law relied on. In addition to answers to the pursuer’s condescendence,

defences may take the form of a separate statement of facts; this ought to be done where the defender admits, in the main, the facts of the pursuer, but himself relies on a separate series of facts. The same course ought to be followed wherever the facts relied on by the defender are separate and distinct from the facts stated in the pursuer's condescendence, and can neither be put as an amplification of a denial or explanatory of an admission. New facts should only be stated in answer to the condescendence when their relationship to the pursuer's facts is such as to make it convenient to have them as close to one another as possible. It is impossible to lay down hard and fast rules on this matter. Counsel must exercise their own discretion. All the grounds of defence should be stated at once (6 Geo. IV. c. 120, s. 2; 36 & 37 Vict. c. 91); but the record may be amended at any time during the continuation of the cause, on conditions (see AMENDMENT). Admissions made in defences are binding in the action in which they are made, but in no other (*Wauchope*, 1860, 23 D. 191). Inconsistent defences are admissible (*Buchan*, 1828, 6 S. 1025), but ought rarely to be employed; where pleaded, the facts must be averred alternatively (*Mackay's Manual*, p. 219). Appended to the defender's answers and statement of facts is a note of the pleas in law. Defences must be signed by counsel. Defences must be lodged, in session, on the tenth day after the case has been called; in vacation, defences to summonses called within the last ten days of the preceding session may be lodged on the first box-day, and to summonses called on the first box-day, they may be returned on the second box-day. It must be stated by whom defences are lodged. Where one of two defenders had left the country before the defences were lodged, the pursuer moved that the defender's agent be ordained to produce a mandate. No appearance was made for the defenders or their agents, and the Lord Ordinary, *ex proprio motu*, pronounced the following interlocutor: "Appoints the defences to be withdrawn, in respect it is not stated for whom they were lodged" (*Fernie*, 1894, 2 S. L. T. 303).

*JOINT DEFENCES.*—Where there are several defenders with the same defence, a single statement is sufficient for all, each defender adopting the defence made for the leading defender. Joint litigants, maintaining the same defence, will only be allowed the expense of one set of defences (*Bell*, 1883, 10 R. 905). See EXPENSES.

*DILATORY OR PRELIMINARY DEFENCES.*—A preliminary defence is one which, if sustained, puts an end to the action without dealing with the merits, or at all events suspends further procedure until some other action has been decided, or some necessary proceeding taken. The proper decree when a preliminary defence is sustained is to dismiss or sist the action. It may be convenient to state here shortly the various preliminary defences.

(1) *Declinature of Judge.*—Objection may be taken to the judge on the ground of personal interest in the case, or on the ground that he has no jurisdiction. In either event the objection should be taken at the first stage of the case. If the ground of declinature is no jurisdiction, there is no excuse for delay: and if not put forward at the first opportunity, the right to do so may be held as waived. See DECLINATURE; JURISDICTION.

(2) *Irrelevancy.*—Objection to the relevancy of an action is a preliminary defence. The meaning of this plea is that the pursuer, even if his averments were proved, has not stated a case which entitles him to decree in terms of the conclusions of his summons. In judging of relevancy the admissions of the defender—though of course not his statement of facts—may be taken into account (*Pringle*, 1867, 5 M. (H. L.) 55).

(3) *Incompetency.*—The plea of incompetency is an objection to the

conclusions of the summons, as, for instance, where the improper form of action is brought.

(4) *Want of Specification*.—This plea is in a sense a subdivision of the main plea of irrelevancy; but it may, and perhaps ought to be, regarded as a separate defence. It requires no explanation: the words explain themselves. A case is rarely if ever dismissed on this ground: the Court either allows amendment or orders a proof before answer.

(5) *Lis alibi pendens*.—This is a plea that the same question is being litigated in a prior action in another Court by the same parties. The subject-matter must be the same (*Magistrates of Arbroath*, 1883, 10 R. 767). The actions must be between the same parties, or between parties representing the same interest (*Fraser*, 1845, 17 Sc. Jur. 143). Where there were counter-actions of declarator, the one to have a deed declared valid, the other to have the same deed declared invalid, *lis alibi pendens* was held not to apply (*Howden*, 1864, 2 M. 637, per *Ld. Deas*). This plea, however, may be competent against a part of an action, though it is not applicable to the whole (*Wallace*, 1875, 2 R. 999). The prior action must be pending in a competent Court (*Magistrates of Arbroath*, 1883, 10 R. 767). This Court, it would appear, must be in Scotland (*Mackay's Manual*, p. 226; see, however, *More's Stair*, note A, p. xi). It is not clear what the precise effect of the Judgments Extension Act upon this plea is; it is doubtful whether the Court will dismiss an action on the ground that another action is pending in England, but it is probable that they would sist the second action until the result of the first is determined. See *LIS ALIBI PENDENS*.

(6) *No Title to sue*.—The meaning of this plea is either that the pursuer has no title to sue, or that the defender has a title to exclude. See *TITLE TO SUE*.

(7) *All Parties interested not called*.—This plea should be argued in the procedure roll: if sustained, the pursuer is given an opportunity of calling the parties omitted, and if he fails to do this, the action is dismissed (*Earl of Galloway*, 1870, 8 M. 959). In one case where the defender failed to take the objection until after proof, he was held to have waived his right to the objection (*Tod's Trs.*, 1869, 8 M. 264). There are two reasons for adducing this plea, firstly, that there are parties not present who have an interest in the question at issue, and who, if not called, may suffer prejudice: and secondly, that the non-calling of certain persons may prejudice the defender. To support the plea on the second ground, the defender should state on record facts sufficient to show that he will be prejudiced if the plea is not sustained. Thus where, in an action for aliment by a father against one of four children, the defender pleaded that the other children should have been called, the Court repelled the plea, on the ground that there was no averment that the other children had a superfluity of means (*Hamilton*, 1877, 4 R. 688). Prior to the Court of Session Act, 1868, the rule was that parties omitted could only be called by a supplementary action. It is considered that this procedure is still necessary in spite of the enlarged power of amendment given by that Act (*Mackay's Manual*, p. 222). Parties not called may, however, sist themselves as defenders (*ib.*). A new pursuer cannot be imported into a suit without the concurrence of the defender (*Hislop*, 1881, 8 R. (H. L.) 95).

*PEREMPTORY DEFENCES*.—A peremptory defence is one which, if sustained, forms *res judicata*, and prevents another action being raised on the same grounds (*Mackay's Manual*, p. 221). The proper decree, when a peremptory defence is sustained, is to assoilzie the defender. It is a defence on the merits. It is impossible to be specific in dealing with such defences.

their variety is so great. All defences not mentioned in the list of preliminary defences may be regarded as peremptory.—[Mackay's *Manual*, pp. 211–227, 416–417, 473–509; *Practice*, vol. i. pp. 428–442, vol. ii. 254–315; Coldstream, p. 15; Balfour, pp. 36–38.]

**Defences (Sheriff Court).**—Where a defender intends to state a defence, he signifies his intention by entering appearance (see APPEARANCE, ENTERING, SHERIFF COURT). Having done so, he must lodge his defences on the first Court day after the expiration of the induciæ (of citation) (see *Mackenzie*, 1894, 22 R. 45), or at the latest at an adjourned diet not later than seven days after the expiry of the induciæ. In either case he must lodge them with the Sheriff Clerk (Sheriff Courts Act, 1876, 39 & 40 Vict. c. 70, s. 16). These provisions cannot always be carried out literally, as it is not possible in all cases that there should be an adjourned diet not later than seven days after the expiration of the induciæ. The alternative given by the Act seems to imply that in all cases the defender shall have at least to within seven days of the expiry of the induciæ to lodge his defences in, and that they shall be received by the Sheriff Clerk if tendered within that time. Where the first Court day occurs more than seven days after the expiry of the induciæ, the defender will have till the close of business hours on that day, but not longer, in which to lodge his defences (see Dove Wilson, *Practice*, p. 142).

The time for lodging defences cannot be extended even by consent of parties (Act of 1876, s. 19), but on special cause shown the Sheriff may prorogue it once (16 & 17 Vict. c. 80, s. 6; *Nicol*, 1888, 26 S. L. R. 61; *Bainbridge*, 1879, 6 R. 541; see ADJOURNMENT, SHERIFF COURT).

The defences must be in the form of articulate answers to the condescendence, and, where necessary (that is, when merely answering the condescendence does not disclose the defender's whole case), a separate statement of the facts on which the defence is founded, and conclude with a note of the defender's pleas in law. The answers and statement of fact should be made succinctly, and without quotation from documents, except where indispensable (Act of 1876, s. 16).

For the various kinds and divisions of defences, see DEFENCES (COURT OF SESSION).—[Dove Wilson, *Practice*, pp. 141–145.]

**Defender.**—Defenders must be designed as accurately as possible by their full names and present addresses, but trifling and excusable inaccuracies will be overlooked where there is no real doubt as to the person intended (*Guthrie*, 1833, 11 S. 465; *Spalding*, 1883, 10 R. 1092; *Cruickshank*, 1888, 15 R. 326). But a substantial misnomer is fatal (*Brown*, 1884, 12 R. 340). If the defenders are sued in a special capacity, as trustees, executors, and the like, the capacity must be accurately set forth: for in such cases the designation really contains one of the grounds of action: and if it is incorrect, the action may be dismissed although in some other capacity the defenders may be liable. The individual names of the defenders, as well as the capacity in which they are sued, must be set forth: otherwise the citation is bad. (Mackay, *Manual*, 191.) See SUMMONS; CITATION.

**DIFFERENT CLASSES OF DEFENDERS.**—*Pupils.*—If the defender is a pupil, his father should be called along with him as his curator-in-law (39 & 40 Vict. c. 70, s. 12 (4)). If the father is dead, the mother should be



called as guardian (49 & 50 Vict. c. 27). If neither father nor mother is called, then it is necessary to cite the pupil's tutors and curators — *nominatim* if they are known; if not, then generally, "if any he has" (Mackay, *Manual*, 166; Fraser, *P. & C.* 157). If tutors and curators are not called either specially or generally, the action is incompetent, and the omission cannot be remedied by a supplementary summons, nor by the appointment of a *tutor ad litem*, even if the pupil appears (*Thomson's Trs.*, 1863, 2 M. 114). If they are called and do not appear, a *tutor ad litem* must be appointed, or a decree against an appearing pupil will be as in absence (*Mackenzie*, 1861, 23 D. 1201). But if no appearance is made for either pupil or tutors after due citation, the pursuer cannot insist on the appointment of a *tutor ad litem*, but must be content with a decree in absence (Fraser, *P. & C.* 156; *Sinclair*, 1828, 6 S. 336). If the pupil has no tutors, there must still be edictal citation of tutors and curators, if any; in which case a decree against the pupil will not be null, but only reducible, the onus being on the defender to prove that the decision was wrong on the merits (*Grieve or Dingwall*, 1871, 9 M. 582). See PUPIL.

*Minors.*—A minor's father or his curators must be called along with him, as in the case of a pupil; but in this case the omission may be made good by a supplementary summons. If the curators do not appear after being cited, a decree against the minor is a decree in absence, and the same is probably the case even where the curators have not been called (Mackay, *Manual*, 168). If the minor appears, but his curators decline or are unable to do so, a *curator ad litem* will generally be appointed; but this is not essential unless demanded by one of the parties (*Cunningham*, 1880, 7 R. 424). See MINOR: CURATOR.

*Insane Persons.*—An insane person who has not been cognosed, but who has a *curator bonis*, must be called along with his curator: if the lunatic has been cognosed, the curator is called alone. In all processes of cognition, or for appointing a curator, there must be personal service on the lunatic. When a defender becomes insane during a process, the proper course is to apply for a *curator bonis* in common form, and not for a *curator ad litem* by incidental motion (*Anderson's Trs.*, 1871, 8 S. L. R. 325). See JUDICIAL FACTOR.

*Wives.*—When a wife is defender, her husband must generally be called as her curator, as well as for any interest he may have. This is unnecessary when

- (1) The action is at the husband's instance;
- (2) The wife is judicially separated from her husband, or has obtained a protection order;
- (3) The action is in respect of a separate business carried on by the wife (*Gray*, 1840, 2 D. 1205; *Gifford*, 1853, 15 D. 451).

It is usual and safer, although perhaps not necessary, to call the husband even when the wife has a separate income under the Married Women's Property Acts (Mackay, *Manual*, 166).

When the husband is not called, decree against the wife is a decree in absence, but decree in her favour is valid (Mackay, 166; Fraser, *H. & W.* i. 583). If a female defender marries during the dependence of an action, her husband should be sisted; but if a husband dies, his representatives need not be sisted, unless he has appeared not only as his wife's curator but in his own interest (*Murray*, 1843, 6 D. 159). If the husband has been improperly omitted, a supplementary summons must be raised. If a husband refuses to appear, the wife may do so, and a *curator ad litem* will be appointed (*Mackenzie*, 1830, 9 S. 31; Mackay, 166).

*Bankrupt.*—When the subject of the suit relates to the sequestrated estate or a claim against it, the trustee is the proper and only necessary defender, although it is expedient to call the bankrupt for any present or future interest he may have. But if the action is one with personal conclusions against the bankrupt, or is connected with estate which has not passed to the trustee, the bankrupt only is called, and he need not sist the trustee, nor, in the usual case, find caution for expenses (*McIntosh*, 1826, 4 S. 775; *Russell*, 1839, 1 D. 617; *Taylor*, 1833, 6 W. & S. 301; *Buchanan*, 1880, 8 R. 220; *Lawrie*, 1888, 16 R. 62). It is always, however, in the discretion of the Court to order a defender to find caution (*Thom*, 1888, 15 R. 780): the substance of the action will be looked to, and if the bankrupt is defender only in form, caution may have to be found (*Ferguson Lamont & Co.'s Tr.*, 1889, 17 R. 282). A bankrupt, however, does not cease to be a defender when he reclaims against an adverse decree (*Russell*, 1839, 1 D. 617; *Bell*, 1840, 2 D. 1460). In any action against a bankrupt, notice should be given to the trustee, that he may sist himself if so advised; but if he does so, it must be unconditionally, and he becomes liable for past and subsequent expenses (*Ellis*, 1870, 8 M. 805).

*Heir and Executor.*—In an action of constitution of a debt due by a deceased person, either heir or executor may be sued without calling the other (*British Linen Co.*, 1850, 12 D. 949; 31 & 32 Vict. c. 100, s. 60); and such an action is competent against next of kin without calling executors nominate (*Smith's Trs.*, 1862, 24 D. 1142).

*Joint and Several.*—(1) In an action against *joint* obligants, all must be called as defenders. (2) If the obligation is *joint and several*, or *ad factum prestandum*, or on a bill or promissory note, one or more of the obligants may be called, each being liable *in solidum*. But if a joint and several obligation is not constituted by writing or decree, the pursuer must call all the alleged co-obligants within the jurisdiction (*Neilson*, 1890, 17 R. 608). (3) Joint *pro indiviso* proprietors must all be called in an action relating to heritable property. (4) *Joint delinquents* being liable *singuli in solidum* for the joint damage, an action may be raised against any one or more of them, and the whole damages may be recovered against one (3 Ersk. i. 15; *Western Bank*, 1862, 24 D. 859; *Croskery*, 1890, 17 R. 697; *Murray*, 1881, 19 S. L. R. 253). But in an action for breach of contract, all the parties to the contract must be called (*Goldie*, 1868, 6 M. 541; *Ross*, 1848, 10 D. 1493). The Act of Regulations of 1696 restricted to six the number of unconnected defenders who might be called in one action for separate debts, but the regulation is of no importance in modern practice, and in any event does not apply to joint delinquents. If the ground of liability is the same, or at least if there is a common interest between the parties,—as in the pollution of a stream by papermakers,—any number of defenders may be called in the same action (*D. of Buecheuch*, 1876, 4 R. (H. L.) 14). But even if several defenders are competently called, the summons may be incompetent in concluding for a slump sum of damages in respect of distinct wrongs by different defenders; as in the case of an action concluding for one sum of damages “jointly and severally or severally” against A. for wrongously raising an action, and B. for publishing the decree in a Black List (*Taylor*, 1885, 12 R. 1304). The different wrongs must be dealt with in different conclusions, capable of being applied separately (*Barr*, 1868, 6 M. 651; *Smyth*, 1891, 19 R. 81).

*Principal and Agent.*—In an action for debt, or damages, or implement on a contract professedly concluded for a principal by an agent, the proper defender is the principal, and not the agent (*King*, 1827, 5 S. 231; *McMillan*,

1842, 4 D. 492; *Aitken*, 1865, 4 M. 36). But the question of liability depends on whom credit was given to; and the agent may be called as defender when (1) he has acted for an undisclosed principal (Bell, *Prin.* 224 A), in which case the other contracting party may, on discovering the principal, elect to sue either him or the agent; or (2) when the agent has clearly interposed his own credit, in which case either principal or agent may be sued, or both alternatively (Mackay, 169). If it is doubtful whether an agent has interposed his own credit or had power to bind his principal, an action with alternative conclusions may be brought against both (*Jardine's Trs.*, 1862, 24 D. 443).

*Partners.*—In the case of a subsisting firm, the debt must first be constituted against the firm, after which the decree may be enforced against individual partners (*Muir*, 1862, 24 D. 1119). But in the case of a foreign firm, the law of whose domicile does not recognise it as a separate *persona*, it is sufficient to call all the partners who are within Scotch jurisdiction (*Muir, supra*). If the firm is dissolved, an action may be raised against the partners as individuals, but all must be called who are within the jurisdiction (*Muir; M'Naught*, 1885, 13 R. 366).

*Superior and Landlord.*—Superiors and landlords cannot as a rule be sued on account of a wrongful use of property by feuars or tenants: but if the charter or lease necessarily, or by natural consequences of the occupation, authorises or sanctions a nuisance, the superior or landlord is answerable (*Caledonian Ry. Co.*, 1876, 3 R. 839; *Scott*, 1881, 8 R. 851).

*Mandatory.*—A defender may be ordered to sist a mandatory; but the Court has here a wider discretion than in the case of a pursuer, and the modern tendency is to refuse to order a defender to sist a mandatory (*Clark*, 1873, 1 R. 281; *D'Ernesti*, 1882, 9 R. 655; *Macdonald's Trs.*, 1891, 28 S. L. R. 363; *Aitkenhead*, 1892, 19 R. 803). See MANDATARY.

When a defender dies during a process, the action must be transferred against his representatives. In modern practice this is effected by minute and motion, an action of transference being no longer necessary (31 & 32 Vict. c. 100, s. 96).

See ACTIONS; CITATION; DEFENCES; EXPENSES; PURSUER; SUMMONS.

**De Fideli.**—See OATH DE FIDELL.

**Deforcement** is the crime of forcibly preventing an officer of the law or his assistants from executing the legal warrant of a competent Court. The essential features of the offence of deforcement are these:—

(1) *The Resistance offered to the Officer must be Forceful.*—Any sort of actual violence, or the show of violence, is sufficient, if the officer is thereby alarmed, and so prevented from doing his duty. He need not receive actual injury. He may be inveigled into a room, and the door locked upon him. Or he may be prevented from effecting a capture by the friends of the persons proposed to be arrested surrounding him, and so keeping the officer at a distance. Or, again, a rescue may be effected after the officer has made an arrest. It is even deforcement if the officer cannot effect an arrest owing to efforts of resistance—however passive these may be—made by the person whom he wishes to arrest (*Hunter and Peacock*, 1860, 3 Irv. 518). The alarm of the officer, however, must be reasonable. The violence, or show of violence, offered must be such as would overcome the constancy of a man of ordinary courage and presence of mind (*Hunter and Peacock, supra*;

*Nicholson*, 1886, 1 *White*, 312). The force used towards the officer must have reference to the duty which he is in course of discharging, and must be designed to prevent the accomplishment of his object.

(2) *There must be Actual Prevention of the Diligence being carried out.*—If the officer persists, in spite of the resistance which is offered to him, and accomplishes his object, there is no deforcement, however much injury has been inflicted upon the officer. The offender, in such circumstances, can be prosecuted only for attempt to deforce, or for aggravated assault. If, on the other hand, the officer has been prevented from carrying out his object, the offender cannot, by repentance or restitution, absolve himself from the guilt of deforcement (*Hamilton and Others*, 1725, *Hume*, i. 395).

(3) *The Officer and his Assistants must be duly Qualified.*—His appointment or commission as an officer of the law must have been completed, and must be existing and in force at the moment of deforcement. There can be no deforcement of private individuals who, without warrant, take it upon themselves to act as officers of the law. It is even doubtful whether a private individual to whom, in urgent circumstances, a warrant has been issued, becomes an officer of the law, to the effect of being capable of deforcement (*Hume*, i. 387).

(4) *The Officer must be carrying out his Lawful Duty.*—It is not deforcement if an attack is made upon the officer before he has reached the place where he is to perform his duty, and before he has begun to do so, or to make preparations for doing so. Nor is it deforcement to attack him on his return after his duty has been done, or after he has attempted to do so, and subsequently desisted. But it is deforcement if the officer is engaged in the performance of his duty, or is making preparations to do so, and is by force prevented from carrying out his purpose (*Maclean and Others*, 1886, 1 *White*, 232; *Nicholson and Others*, 1887, 1 *White*, 307).

(5) *The Officer must perform his Duty in a Lawful Manner.*—He must, at the outset, notify to those who are to be affected by the diligence, that he is an officer of the law. The best notification is to display his blazon or baton, to state his errand, and, if called upon to do so, to show his warrant. If the parties concerned know him to be an officer, he need not display his blazon. Nor need he show his warrant unless this is asked, the presumption being that the parties knew of the existence and nature of the warrant, if they did not make a demand to see it. If an officer is asked to show his warrant and refuses to comply, it is not deforcement if he is then resisted. In no case, however, is the officer bound to part with the warrant. He is not bound even to show it after the diligence has been completed, if the party concerned has submitted to the execution without demur. No warrant is required by revenue officers in performing their ordinary duties, and it is therefore no defence to a charge of deforcing revenue officers, to assert that they had no warrant (*Hamilton and Jamieson*, 1845, 2 *Brown*, 495). But where revenue officers are performing duties outside their ordinary sphere, they require a warrant (*Stewart and Others*, 1856, 2 *Irv.* 416).

The officer, in executing his commission, must observe all the solemnities which are prescribed by law. He is not entitled to execute letters of caption on a Sunday, or after he has seen a sist or suspension of the letters. Nor may he lawfully poind goods at night, nor break open doors to poind, without letters of open doors. If, in these circumstances, he is resisted, there is no deforcement. It is, however, no defence to a charge of deforcement, that the officer has violated a usage which is merely local (*Davidson*

*and Others*, 1841, Shaw, 41). Offer to pay the debt due will not justify resistance to the officer, unless he was authorised to receive payment. But the production of a discharge applicable to the diligence will afford a valid defence, if the officer has disregarded the discharge.

(6) *The Warrant may issue from "any Judicatory."*—The writs of every Court of law which require to be served are protected by the pains of deforcement.

*Indictment.*—The form given in Sched. A of the Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35) is: "You did deforce John MacDonald, a sheriff-officer of Renfrewshire, and prevent him serving a summons, issued by the Sheriff of Renfrewshire, upon Peter McInnes, market-gardener in Renfrew" . . .

*Tribunal.*—The offence of deforcement is dealt with, according to circumstances, either by the Court of Justiciary or in a summary Court (*Matheson*, 1885, 12 R. (J. C.) 40).

*Prosecutors.*—As a rule the Crown prosecutes in cases of deforcement, as in other crimes. But the prosecution may be at the instance of the officer who has been deforced and the Lord Lyon, and the concurrence of the employer of the officer is unnecessary. The prosecution, again, may be at the instance of the employer of the officer.

*Punishment.*—The penalties of deforcement were formerly matter of statutory enactment. The Act 1581, c. 118, provided that those convicted of deforcement should be punished by escheat of moveables, the creditor being preferable for his debt, expenses, and damages. The Act 1587, c. 85, enacted that persons guilty of deforcement should be prosecuted either civilly or criminally, at the option of the pursuer, and that their lives and goods should be at the king's will. The Act 1592, c. 152, makes the punishment of deforcement forfeiture of moveables, one half to the king, the other half to the pursuer.

The punishment of deforcement is now fine or imprisonment, or both.

[Hume, i. 386; Alison, i. 501; Stair, i. 9. 29, iv. 49; Ersk. iv. 4. 32; Macdonald, 218; Anderson, *Criminal Law*, 54.]

**Defrauding of Creditors.**—See DEBTORS ACT: FRAUDULENT BANKRUPTCY.

**Defrauding the Revenue.**—All fraudulent evasions of the provisions of the Revenue Acts, which provide for the payment of taxes or duties to Government, are criminal. By the Act of Union these Statutes are made practically the same in Scotland as in England. The special Act which has been evaded usually prescribes the penalty of the evasion, and the tribunal which may impose it. See EXCHEQUER, COURT OF: EXCISE; REVENUE; SMUGGLING.

**Degrees of Kinship.**—The relationship to each other of persons in the same line of kindred, that is, of persons sprung from a common ancestor, is measured by what are termed "degrees of kinship." It may be said generally that each generation constitutes one degree of kinship; but, as some difference of practice has existed in counting the degrees owing to the different systems of the Roman and the canon law, it will be necessary to state their respective methods.

1. The Roman law computation is that which is now most universally recognised in Scotland: its method is as follows:—*In the direct line*, one degree is counted for each generation up to and including the common stock. Thus, the son, being in the first generation, stands in the first degree of relationship to his parents, the grandson in the second degree to his grandparents, and so forth. *In the oblique or collateral line*, that is, amongst those sprung from a common ancestor, but who are not descendants or ascendants of each other, such as brothers, uncles, or cousins, the computation proceeds by counting the generations from one of the persons up to the common stock, and thence downwards to the other. Thus, brothers are related to each other in the second degree, as there is one generation from one to the father, the common stock, and one generation thence to the other brother. First cousins are in the fourth degree, as two degrees remove the one from the grandfather, the common stock, and there are thence two degrees to the other. An uncle is to his nephew in the third degree, as the uncle is one degree, the nephew two degrees, distant from the common stock.—(See Ersk. i. 6. 9; Bankt. i. 5. 37 and 38; Fraser, *H. & W.* i. 105, 106; *Institutes*, iii. 6: *Digest*, xxxviii. 1.)

2. The canon law computation is the same as that of the Roman law as regards the direct line. As regards the oblique or collateral line there is this difference: the degree of kinship is arrived at by counting the number of generations between the person furthest removed from the common ancestor and that ancestor. Thus, brothers are to each other in the first degree, as both are in the same generation equally one degree removed from the father, the common ancestor. Similarly, first cousins are in the second degree, as each is two degrees from the common ancestor; but an uncle and his nephew are in the second degree, as the nephew, the furthest removed, stands two generations from his grandfather, the common ancestor.—(See Fraser, *H. & W.* p. 107; *Dict. de droit Can., sub voce; Degré de Parenté; Decretal*, iv. 14.]

Up to the Reformation the canon law computation was universally followed in this country, and even after that date it is still found in use, as, for example, the Statute 1567, c. 15, which refers of cousins-german as “seconds in degrees of consanguinity and affinity.” In modern times, however, the Roman law system has been more approved, and is now in general use amongst Scotch lawyers.

The accompanying table shows the degree of kinship in which a person's various relations stand to him, according to the civil law computation. A more elaborate table, giving both the Roman and the canon law degrees, will be found in the “*Arbor Consanguinitatis*,” *Corp. Jur. Can.*, 1879, Appendix.

As regards the degrees of kinship within which marriage is prohibited, relations by affinity stand in the same position as those by consanguinity; “and the rule of computing its degrees is, that the relations of the husband stand in the same degree of affinity to his wife in which they were related to the husband by consanguinity, which rule holds *ex converso* in the case of the wife's relations” (Ersk. *Inst.* i. 6. 8, 9).

In succession a notion at one time prevailed, derived from the *Book of Feus* (*Lib. Fund.* i. 14), that legal relationship did not extend beyond the seventh degree. This has never been the law of Scotland (see Stair, iii. 3. 47; Ersk. *Inst.* iii. 10. 2, and authorities there cited). See SUCCESSION generally.

See AFFINITY; MARRIAGE; DECLINATURE; INCEST.



**Delay.**—See MORA.

**Del credere.**—*Del credere* is an Italian mercantile law term, nearly equivalent to guarantee or warranty. An agent is said to undertake a *del credere* engagement when, for an additional consideration, called *del credere* commission, he guarantees to his principal the solvency of third parties. The engagement is most frequently met with in the case of agents to whom goods are consigned for sale, but a *del credere* commission may be undertaken by any agent conducting transactions involving the credit and responsibility of persons unknown to the principal, as, for instance, by a bank agent or an insurance broker (Bell, *Com.* i. 395).

The precise nature and scope of the obligations undertaken by a *del credere* agent have been much discussed. It is stated in Bell, *Com.* i. 395, that the agent is in precisely the same position as if he had received in loan the money of the principal: and no payment that would not be effectual as between debtor and creditor will discharge his responsibility (*Scott*, 1795, Bell's Oct. Ca. 138). It is further stated that the guarantee is not on the one hand a cautionary obligation in the ordinary sense of the term; for the factor with a *del credere* commission is liable directly, and without any benefit of discussion; neither is it, on the other, to all intents and purposes a *delegatio debiti*, for if the guarantee fail, the principal is entitled to resume his character and recover from the proper debtor, if he have not previously paid to the guarantee; and Mr. Bell refers to *Ld. Mansfield's dictum* in *Grove* (1786, 1 T. R. 112), to the effect that "this is an absolute engagement to the principal by the broker, and makes him liable in the first instance." But later English cases have discredited this doctrine, and the principle now accepted in England is that the *del credere* agent is merely a cautioner, and liable only on the buyer's failure (*Morris*, 1816, 4 M. & S. 566; *Hornby*, 1817, 6 M. & S. 166; *Smith's Mercantile Law*, 127). In Scotland, the question does not seem to have been judicially decided; but it may be said that in America the more recent decisions seem to favour the doctrine as stated by Mr. Bell, and to affirm the agent's primary liability (*Wolff*, 1845, 43 Am. Dec. 751; *Lewis*, 1870, 3 Am. Rep. 190). It must, however, be noticed, that although in England a *del credere* agent is a mere cautioner, his guarantee is not within the Statute of Frauds, and does not require to be proved in writing. If the agent, for a percentage, guaranteed the debt owing, or performance of the contract, by the vendee, being totally unconnected with the sale, he would not be liable without a note in writing signed by him; but being primarily the agent to negotiate the sale, a higher reward is paid merely in consideration of his guaranteeing the solvency of the vendees. It may terminate in a liability to pay the debt of another, but that is not the *immediate* object for which the consideration is given (per Parke, B., in *Conturier*, 1852, 8 Exch. 40; and see *Sutton*, 1894, 1 Q. B. 285). The analogous question of whether, in Scotland, a *del credere* guarantee falls within sec. 6 of the Mercantile Law Amendment Act, 1856, has not been raised, but it probably does not, on the principle that the contract is primarily one of mandate and not of guarantee, the latter being merely a condition regulating the agency (Bell, *Prin.* 286, note a).

It is unnecessary to particularly consider the relations between the parties to a *del credere* contract, for the *del credere* nature of the engagement has no effect on the general validity and extent of the agent's authority—a *del credere* agent differing from other agents only in respect of his obligation



to guarantee (per Mellish, L. J., in *ex parte White*, 1871, L. R. 6 Ch. 403). The appointment may be express; or inferred from the conduct of the parties; or implied by usage of trade (*Stein's Assignees*, 1828, 7 S. 47), as in the case of agents for foreign principals, where it appears to be implied, if nothing is said to the contrary, that the agent shall receive a *del credere* commission, and guarantee his sales (Bell, *Com.* i. 395). In the event of the buyer's failure, a *del credere* agent may claim on the debtor's estate in satisfaction of his obligation to guarantee. This, however, will not affect the buyer's right of retention or compensation against the principal, the exercise of which will be a good answer to the agent's claim, and will at the same time discharge the guarantee (Bell, *Com.* i. 538). If the agent and buyer are both insolvent, the principal may claim on both estates for the full amount of his debt, but not to the effect of obtaining more than twenty shillings in the pound. Mr. Bell also states (*Com.* ii. 126), on the authority of the case of *Grove, supra*,—and the statement is repeated in Goudy on *Bankruptcy*, p. 587,—that a *del credere* agent may set off the buyer's debt against a debt due by him to the buyer, “upon the ground that although the principal has collateral recourse against the purchaser, the factor is liable in the first instance to his principal, and has a direct claim against the purchaser.” But this statement must be read in the light of the modification of the English doctrine already referred to, according to which the agent is liable only on the failure of the third party. The purchaser cannot plead against the principal compensation on a proper debt of the agent, the *del credere* engagement being *res inter alios* (Bell, *Com. sup.*; Goudy, *sup.*)

See AGENCY; COMPENSATION; PRINCIPAL AND AGENT.

**Delectus personæ**, literally “choice of person,” is a phrase denoting a doctrine of the law of Scotland that a person selected for any office, position, or contract, on account of personal qualification or suitability, may not assign or delegate the performance of the duties to another. Like all implied conditions, this doctrine applies only in the absence of express stipulation between the parties; and, accordingly, cases arising out of express stipulation will be noticed in this article only where the decision involves or illustrates the general principle.

**LEASES.**—In the tenancy of rural subjects the law holds that the tenant is chosen for personal reasons, and may not, therefore, under a lease of ordinary duration, assign or sublet his holding without the express consent of the landlord (*Hume*, 1680, Mor. 10391; *E. of Peterborough*, 1791, Mor. 15293; Ersk. ii. vi. 31; Hunter on *Landlord and Tenant*, i. 218–236; Rankine on *Leases*, cc. viii. and ix.; Bell, *Prin.* ss. 1214 *et seq.*). The origin of this principle, as applied to leases, is to be found partly in the necessity formerly existing for preventing powerful and unscrupulous persons from obtaining lawful possession, as assignees, of land they desired ultimately to annex; and partly on account of the military service which the tenants were bound to render to their landlord. But the doctrine is now maintained on the presumption of the lessee's qualifications, pecuniary credit, agricultural skill and desirability as a neighbour (Hunter on *Landlord and Tenant*, i. 218). This principle was formerly held to exclude both the heir of a deceasing tenant and also adjudgers, *i.e.* assignees who come in, not by the favour of the tenant, but by the operation of law. It is now settled that the doctrine applies only to voluntary alienations, and does not exclude heirs (*Thomson*, 1750, Mor. 10337; Bell, *Prin.* s. 1219; Hunter, *Landlord*

and Tenant, i. 219), or adjudgers where there is no express exclusion of assignees (*Elliot*, 1747, Mor. 10329; Ersk. B. ii. tit. vi. s. 32; Bell, *Prin.* s. 1216). Where a lease contains a clause excluding assignees or sub-tenants unless approved of by the landlord, or admitting them if approved by him, it is now settled, reversing former decisions, that the landlord may withhold his approval arbitrarily and without assigning a reason (*Muir*, 20 Jan. 1820, F. C., and Bell on *Leases*, 4th ed., p. 181; *Wight*, 17 D. 364; *Stewart*, 35 Sc. Jur. 307; *D. of Portland*, 4 M. 10 (mineral lease)). Where, under such a clause, a lease was assigned with the landlord's consent, it was held incompetent for the assignee to retrocess to the original tenant without the landlord's consent (*Ramsay*, 4 D. 405). It was formerly held that marriage of a female tenant operated as an assignation of the lease to the husband, and consequently put an end to the lease. But it was subsequently recognised that a lease, being heritable property, did not fall under the *jus mariti* (1 Bell, *Com.* 72, note 4), and that a lease to an unmarried or widowed woman is not made void by her marriage, even where there is express exclusion of assignees (*Gillon*, 1775, Mor. 15286; Hunter, *Landlord and Tenant*, i. 204).

"A lease of shootings implies *delectus personæ* in a sense perhaps more emphatic than any other kind of lease" (per L. Kinloch in *E. of Fife*, 3 M. at 324; Rankine on *Leases*, pp. 169 and 455), and, accordingly, leases of sporting subjects may not be assigned or sublet without the landlord's consent.

*Delectus personæ* is also implied in a lease of minerals (*D. of Portland*, 4 M. 10, per L. J. C. Inglis, p. 18, L. Cowan, p. 19, and L. Neaves, p. 22).

The right of objecting to an assignation or sublease on this ground is personal to the landlord, and no one else can found on it (*Hay*, 1801, Mor. 15297; *Dobie*, 2 M. 788). But where trustees under a general disposition attempted to take possession under a lease with a clause excluding assignees, the Court held that the heir of the truster might sue without concurrence of the landlord (*Murdoch*, 1 M. 330).

*Leases excepted from the Application of this Doctrine.*—In leases of urban subjects no *delectus personæ* is implied, and the tenant may therefore assign or sublet, unless expressly prohibited from doing so (Bankt. 2. 9. 12; Bell, *Com.* i. 73, ii. 32; Bell, *Prin.* 1274; Ersk. 2. 6. 32 note; *Aitchison*, 1748, Mor. 10405; *Anderson*, 10 July 1811, F. C.; but see *Gordon*, 4 S. 95, N. E. 97). In this connection an urban subject is defined as a house, shop, or building of any sort, wherever situated. There are, of course, buildings on rural subjects, and gardens surrounding certain residences, but these take the essential character of the principal subjects, to which they are mere accessories (Rankine on *Leases*, 167. On the tenant's inability to alter the essential character of a subject, see *Anderson*, 10 July 1811, F. C.; *Leechman*, 4 S. 683; *Leck*, 17 D. 408; *Hood*, 17 D. 411.)

Leases of unusual duration are held not to imply *delectus personæ*, and may therefore be assigned or sublet, unless the contrary is stipulated; and a prohibition of assignation will not imply a prohibition of subletting, nor *vice versâ*. This is true of both agricultural and mineral leases (Bell, *Com.* i. 73; *Simson*, Mor. 15294; *D. of Portland*, 4 M. 10; *Trotter*, Mor. 15282). The ordinary duration of a farm lease is considered to be nineteen or twenty-one years (*Alison*, 1788, Mor. 15290; *E. of Peterborough*, 1791, Mor. 15293; *E. of Cussilis*, 1806, M. App., "Tack," No. 14). Thirty-eight years has been held an unusual duration (*Simson*, 1794, M. 15294); but there is no actual decision as to any lease for more than twenty-one, and less than thirty-eight, years. A lease for a liferent is assignable as of unusual duration (*Stair*, ii. 9. 26; Ersk. ii. 6. 32; *Hume*, 1637, Mor. 10371); and in *Pringle*, 1802,

Hume, 808, a lease to a minister for the period of his incumbency was held assignable for the same reason. There is no actual decision as to the ordinary duration of a mineral lease, but from the remarks of Ld. Cowan and Ld. Neaves in *D. of Portland*, 4 M. 10, and from the analogy of the Rosebery Act (6 & 7 Will. IV. c. 42, s. 1), which empowers heirs of entail in possession to grant mineral leases of that duration, it is thought that thirty-one years would be the limit of ordinary mineral leases (Rankine on *Leases*, 169).

There is no *delectus personæ* of the lessor (per Ld. Young and Ld. Kyllachy in *Reid's Tr.*, 23 R. 636).

**PARTNERSHIP.**—The relation between partners is so intimate, and mutual reliance so necessary, that the principle of *delectus personæ* applies very strictly between partners. Unless by express consent of all the existing partners, no new partner can be introduced into the firm, not even the trustee on the estate of a partner who becomes bankrupt, nor the representatives of one who dies. A partner may assign his share of the profits of the concern, but the assignee can acquire thereby no right to inspect the books of the firm or share in the deliberations or decisions of the partners. Our law differs from the Roman in recognising as competent stipulations in the contract of copartnership that the heir or assignee of any, or all, of the partners is to be assumed into the firm in such partner's place. The effect of such a clause is practically equivalent to a renunciation by the partners of their *delectus personæ* (Clark on *Partnership*, pp. 141–342; Stair, i. 16. 5; Bell, *Com.* ii. 508; Bell, *Prin.* s. 358; Warner, Mor. 14603; affid. 3 Dow 76). Since the *delectus personæ* applies to the partnership as a whole, and there is but one contract amongst all the partners, it follows that the partnership may, in the absence of contrary stipulations, be dissolved at any time by the retiral or death of any partner; or, in the case of a female partner, by her marriage, which would have the effect of introducing her husband into the firm as a new partner; but if the parties agree that the partnership shall endure beyond the limits of their own lives, it will not be dissolved by death, but will be binding on the representatives of the deceiver (Stair, i. 16. 5; Clark on *Partnership*, 342; Hill, 3 M. 541; Beveridge, 7 M. 1034).

The effect of an assignment by one partner to another of his interest in the concern, or part thereof, was considered in *Cassels*, 6 R. 936; affid. 8 R. (H. L.) 1. The argument that the assignor was not entitled, by diminishing his pecuniary interest in the concern, to lessen his motives for diligence in its affairs, was negatived by the Court; and the question whether the assignee was entitled, without the consent of the remaining partners, to acquire a preponderating voice in the management, was raised (6 R. 943 and 955) but was not expressly decided.

The law relating to partnerships was consolidated by the Partnership Act, 1890 (53 & 54 Vict. c. 39). The only section which needs to be referred to here is the 31st, dealing with "rights of assignee of share in partnership." It practically re-enacts the law as stated above.

**TRUSTEES.**—The power of assuming new trustees and appointing factors, which by the Trusts Acts is conferred on all gratuitous trustees, implies that the ordinary duties of trust administration involve no special *delectus personæ*. But it is otherwise where the powers given to trustees involve the exercise of individual discretion. In such a case the Court will be very slow to extend such powers to assumed trustees, or to judicial factors appointed on the trust estate. The reported cases on this point turn so much on specialties that it is difficult to extract from them a rule of general application. Much weight will be given to the terms of the deed

constituting the trust. If they clearly show that the testator contemplated the powers being exercised by assumed trustees, of whom he could know nothing personally, the Court may sanction the exercise of such discretion, even by a judicial factor (*Simson*, 10 R. 540, and *Howden*, 23 R. 113). On the other hand, where the truster clearly did not contemplate the assumption of new trustees, the Court refused to sanction the exercise, by trustees assumed under the provisions of the Trusts Acts, of a discretionary power of apportionment given to the sole original trustee (*Hill's Trs.*, 2 R. 68). "When the individual to be benefited is pointed out by name, and the discretion conferred on the trustees is merely a discretion to increase the income of the beneficiary or to make over the capital fund of which the beneficiary has enjoyed the income . . . the devolution of such a discretion to new trustees, or to a judicial factor, may be represented as an act of ordinary jurisdiction, not involving the exercise of any arbitrary power by the Court. . . . Yet, so far as I can find, this has only been done in cases where the testator has provided that the discretionary power might be exercised by assumed trustees not chosen by himself" (*Robbie's Judicial Factor*, 20 R. at p. 362 per Ld. McLaren, who referred to *Allan*, 5 M. 1004, and 8 M. 139, and the cases of *Hill's Trs.*, and *Simson*, *supra*; see also *Nisbet*, 10 D. 361; *Auld*, 18 D. 487).

A power of selecting the objects of the testator's bounty was held personal to the trustees, and not to be exercised by a judicial factor (*Robbie's Judicial Factor*, 20 R. 358).

It is not competent for a father to delegate his powers of appointing tutors and curators to his children: so where a testator appoints his trustees to be tutors or curators to any children whom he may leave in pupillarity or minority, the appointment is good only as regards his original trustees, and not as regards assumed trustees (*Walker*, 2 R. 120 and 12 S. L. R. 100).

**MISCELLANEOUS CONTRACTS.**—The general rule was well stated by Ld. Neaves in a case in which the trustee and creditors of a bankrupt sought to establish their right to execute a contract into which the bankrupt had entered. "Where it is of the essence of the contract that the thing to be done requires special skill, genius, art, or even strict personal supervision, such a contract cannot be taken up by a trustee and creditors" (*Anderson*, 2 R. 355). Thus, a right to quarry stones (*Mags. of Arbroath*, 4 D. 538), patronage of a church (*Lord Advocate*, 8 D. 450), and the right to erect a pier (*Leith Dock Comrs.*, 24 D. 64), have all been held personal and not transmissible. It was decided in *Grierson, Oldham, & Co. Ltd.* (22 R. 812), that a limited company could not sue on a contract for advertising entered into by a private partnership whose business the company had been formed to acquire. But *delectus personæ*, though mentioned in this case, was not the real ground of judgment.

The proprietor of a village let the only inn and bakehouse in it for ten years to a person to whom he gave the exclusive privilege of supplying liquors and bread to the inhabitants. The tenant paid £20 per annum as rent for the premises and £160 per annum for the monopoly. It was held that the monopoly was the principal subject of the contract; that it involved *delectus personæ*, and could not therefore be assigned; and that as the premises were merely accessories, the lease of them was not transmissible (*E. of Elgin's Trs.*, 11 S. 585).

**Delegated Jurisdiction.**—A judge cannot as a rule delegate his jurisdiction to a deputy, the only exception of importance in modern prac-

tice probably being the appointment of commissioners to take evidence or recover documents. See COMMISSION, PROOF BY. Similar special delegations, now abolished, were those to messengers to act as judges in apprisings, and to macers of the Session to judge in the service of heirs. In the old heritable jurisdictions the Act 1424, c. 6, conferred an express power of delegation; for however capable the original grantee might have been, his heir might prove quite unqualified to perform the duties of the office. The deputy, or baron-baillie, was therefore invested with all the powers of his constituent, who was answerable for him, the jurisdiction (as in all cases of proper delegation) not being that of the deputy who acted, but of the judge who appointed him (Ersk. i. 2. 13, 14). In the Jurisdiction Act of 20 Geo. II. c. 43, Sheriffs are improperly styled Deputes, for they have a proper, not a delegated, jurisdiction: their authority is derived directly from the Crown. By 9 Geo. IV. c. 29, s. 22, it is provided that the Sheriff-Depute may be addressed by the title of Sheriff without the term Depute being added.—[See Ersk. i. 2. 13 *et seq.*] COMMISSION, PROOF BY; JURISDICTION.

**Delegation.**—It has been observed (*McIntosh*, 10 M. 304) that delegation is nowhere more accurately defined than by Erskine (iii. 4. 22), who says “delegation, which may be accounted a species of novation, is the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged: *e.g.* if the debtor in a bond should substitute a third person who becomes obliged in his place to the creditor, and who in the Roman law is called *expromissor*: this requires not only the consent of the expromissor who is to undertake the debt, but of the creditor.” The nature and extent of the obligation undertaken remains the same: it is only a change in the obligant which occurs. The general rule of law is that a new obligation granted for a prior debt is to be held as corroborative of the former obligation. It is essential, therefore, to produce delegation, that the intention of the creditor to discharge the first debtor and to accept the second in his stead, should be made perfectly clear. Erskine (iii. 4. 22) says that “neither novation or delegation is to be presumed: for a creditor who has once acquired a right ought not to lose it by implication, and consequently the new obligation is *in dubio* to be accounted merely corroborative of the old.” And Ld. Pres. Inglis in *McIntosh*, *supra*, said (p. 309): “It is laid down by all the authorities that delegation is not to be presumed; and I think the doctrine even goes further, and that there is a strong presumption against it.” What constitutes delegation is so entirely a question of intention and fact that each case as it arises must be considered with regard to its own special circumstances, and it is impossible to lay down any absolute rules which will determine it. But it may be accepted as a general rule that to secure delegation it is necessary that the consent of three parties should be obtained, *viz.*, the original debtor, the new debtor, and the creditor who accepts the new debtor and discharges the former obligation. [Reference may be made to *Muir*, 22 D. 1070, *Pollock & Co.*, 2 M. 14, and *McIntosh*, 10 M. 304, where the plea of delegation was rejected; and to *Thriepland*, 17 D. 487, where it was sustained.] See NOVATION.

**Delegatus non potest delegare.**—A delegate cannot devolve or transfer a duty or power conferred on him by another without the consent of the principal. This maxim, when analysed, merely imports

that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract (*De Bussehe*, 8 Ch. D. 286, at p. 310). It is based upon the view that the principal who had conferred upon the delegate the power to act, presumably had selected him from his knowledge of his ability and integrity and personal fitness to discharge the duties intrusted to him, and that this *delectus personæ* would be entirely voided if the delegate were in turn permitted to nominate another to perform his duties. With the exigencies of business this rule, which was formerly very strictly interpreted, has become subject to exceptions; but it still prevails whenever personal trust is conferred on the delegate on account of his personal skill, discretion, or confidential relation (*Speight*, 9 A. C. 1); and it applies equally whether the delegated power has been conferred by public or private authority. All persons appointed to discharge judicial authority, whether in the superior or inferior Courts, have no power to delegate their authority, unless the power to do so is expressly contained in their commission or conferred on them by Statute (*Lord Advocate v. Sinclair*, 11 M. 137). As a general rule the Sheriff-Substitute can exercise all the power, jurisdiction, and authority, of the Sheriff, the terms in which the commission in his favour is expressed, as well as the essential nature of the office, vesting and entitling him to exercise all such powers, unless the contrary is clearly shown (*Fleming*, 1 M. 188). Corporations and other public bodies cannot transfer their authority to a committee of their own number in such a way as to amount to an abandonment or delegation of their authority, but must maintain and actually exercise a general control over the actings of the committee (*Osgood*, L. R. 5 H. L. 636); and when certain quasi-judicial powers are conferred on a committee of a municipal corporation, they cannot delegate to a sub-committee to exercise their powers (*Thomson*, 15 R. 164). Where, by the articles of association, the directors of a company are vested with the power of allotting shares, they cannot, in the absence of express power to do so, delegate their power to a committee (*Harris' case*, 7 Ch. 587). Nor can railway companies or other corporations, who have had conferred on them the power to exercise certain rights and privileges, transfer the same to another body without parliamentary authority (*G. N. Rwy. Co.*, 21 L. J. (Ch.) 837). Where, by 15 & 16 Vict. c. 83, s. 43, it was provided that actions of reduction of letters-patent could proceed only with concurrence of the Lord Advocate, which he was "empowered to give upon just cause shown only," it was held that as such concurrence was not merely a matter of form, but involved his having applied his mind to the case, a concurrence signed by his first clerk was insufficient (*Gillespie*, 23 D. 1357). At common law, trustees have no power to delegate their powers to other persons; and in the absence of powers conferred on them by the deed they cannot assume new trustees. This defect is, however, remedied by the Trusts Acts.

See also *DELECTUS PERSONÆ*.

**Deletions.**—*In Deeds generally.*—Alterations on a deed must be made before subscription, and be authenticated; otherwise either (a) if they are in a material part of the deed, the document will be vitiated (except in settlements, where the matters are separable); or (b) if they are not in a material part of the deed, so that the essential parts of the deed are

intelligible and can receive effect, and there is no fraud, they will be disregarded. There are no statutory provisions as to the mode of authenticating alterations, but the practice in Scotland is uniform, viz. by a declaration in the testing or attestation clause (marginal additions being further authenticated by signature). Alterations, if they are such that they may have been made after the execution of the deed, are presumed to have been so made; the onus of instructing that they were made before subscription rests on the holder of the deed; and the general rule is that extrinsic evidence is inadmissible (*Grant's Trs.*, 1847, 6 Bell's App. 153).

The alterations made before subscription, and duly authenticated, receive effect, and, in point of fact, it is the deed as so altered which is the act of the granter. The deletion or mutilation of a material alteration will, like the mutilation of any other material part of the document, void the deed (*Cunninghamhead*, 1628, Mor. 12274).

The mode of authenticating a deletion is to specify by quotation the particular words deleted, with the line and page in which they occur; unless in the case of large deletions, when the particular line or lines wholly cancelled may be specified. It is objectionable to mention merely the number of words deleted, as other words might be so dealt with as to make it impossible to determine to which words the declaration in the testing clause applied. Alterations not noticed in the testing clause of a deed may be authenticated by the deed having been executed simultaneously in duplicate, when the duplicates refer to each other, and the one is entire wherever the other is altered (*Strathmore*, 1837, 15 S. 449; affd. 1840, 1 Rob. App. 189). A deletion in a gift under the Great Seal has been held to be sufficiently authenticated by a note by the Keeper of the Seal on the margin of the deed, to the effect that the deletion was made by order of the Lord Chancellor and of consent of the party (*Cumming*, 1709, Mor. 11542).

The more important questions have arisen in connection with ERASURES (*q.v.*), but the following points with special reference to deletions may be noticed. In construing a formal deed (not being a *mortis causa* settlement), the Court is not entitled to look at words deleted before subscription of the document, but which remain legible (*Buttery*, 1878, 5 R. (H. L.) 87).

*Mortis Causa Deeds.*—The effect of an unauthenticated or defectively authenticated alteration depends on the materiality of it, and this again depends on the nature of the writ. Alterations by a testator himself will not vitiate the deed as a whole, unless it appears that it was his intention to annul the deed. Thus, in the case of *Kemps* (1802, Mor. 16949), the name of the executor originally appointed was deleted in a settlement, and another interlined, but the deed was held effectual as to a legacy contained in it. In *Traguard* (1822, 1 S. 527) a disposition to several trustees (of whom a majority was to be a quorum) whom failing, to a disponent "and her nearest heirs and assignees whomsoever," in which the name of one of the trustees and the words above quoted were deleted, was not thereby vitiated. The deletion of one of a number of legacies or of a separate clause will not void the remainder of the deed (*Pattison's Trs.*, 1888, 16 R. 73), and so found as to erasures (*Dods*, 1857, 19 D. 820). While, therefore, alterations by a testator on his originally formal settlement may be given effect to (see also *Grant*, 1849, 11 D. 860), the deletions and words substituted by him as a rule require authentication, and it is doubtful, where these are of the essence of the deed, whether the document must not, in order to receive effect, be practically adopted as holograph (*Royal Infirmary of Edinburgh*, 1861, 23 D. 1213). There is "an obvious distinction between what is obliterated; that the former must have been an intentional act

the latter may have been accidental" (Ld. Chelmsford in *Mags. of Dundee*, 1858, 3 Macq. 134): and so, in *mortis causu* deeds, as distinguished from other formal deeds, words deleted may not only be looked at, but words apparently deleted in error may be restored where necessary to make sense of the passage in which they occur (*Adv.-Gen.* 1852, 14 D. 585: *Mags. of Dundee*, *supra*: *Chapman*, 1862, 22 D. 745). In the cases cited the alterations were made by the testator, and there was no fraud; but in the early case of *Pitillo* (1671, Mor. 11536) a deed of settlement was reduced on the ground that half a line was obliterated in a material part of the deed, so that it could not be deciphered, and this was presumed to have been done fraudulently by the person founding on the document.

*Affidavits*.—Deletions should be authenticated by the initials of the deponent and magistrate: but an objection to an affidavit in a sequestration, in which the amount of the debt was deleted and a different sum inserted which corresponded with an annexed account signed as relative to the affidavit, was repelled (*Dyce*, 1846, 9 D. 310).

[Balfour, *Practicks*, 368; *Stair*, iv. 42. 19; *Ersk.* iii. 2. 20; *Ross*, 144; *Menzies*, 127; *Bell, Contr.* 68.]

See ERASURE; DEEDS, EXECUTION OF; VITIATION.

**Delict, Quasi-Delict.**—Delict is used, both in criminal and civil law, to describe a wrongful act. In the criminal sense it regards an act as an offence against the State, and punishable by the State by appropriate penalties. In the civil sense—the one with which this article deals—it regards an act as an offence against any private individual whom it affects, rendering the offender liable in reparation to him for the injury caused. The same act may have both these aspects; and it may be stated, generally, that every criminal act which injuriously affects an individual is also a civil wrong, giving rise to civil remedies. For instance, if A. assault B., A. is liable to a criminal prosecution involving fine or imprisonment, and is also liable to a civil suit at the instance of B., claiming damages for the injury suffered. But although the same act may give rise to both sets of consequences, its legal aspects are clearly distinct and separate. The criminal law aims at punishment of the offender, the civil law at reparation or indemnity to the injured party; and from this distinction different results follow. Criminal liability ceases with the death of the offender, but civil liability affects his estate after his death, and transmits against his executors to the extent thereof. Further, the State does not condone the offence or forego taking criminal proceedings, but the injured individual may forego or discharge his claim as he chooses.

While, however, every criminal act is also a civil wrong, the converse does not hold. Many acts which do not fall within the criminal law give rise to a civil claim of damages. To such an act the name quasi-delict is given, and, though originally bestowed on account of the close analogy of the act so described to a true delict, the name is now applied to an act of mere negligence, which does not at all resemble dole or delict. First we have delict proper, in which evil intention is so strongly present that the act may be punishable criminally; next we have quasi-delict, where, there being only rashness or gross carelessness, the criminal law does not apply, but where the civil law, looking more to the position of the injured, allows him a remedy just as if an actual delict had been committed; and then we have the further stage, where mere negligence, or failure to take reasonable care, is held sufficient to imply liability. Through all these grades the considera-



tion is the breach of duty towards an individual; and while in the former the duty is a negative one, to abstain from injuring, and the breach is an act of commission, and in the latter the duty is a positive one, to take due care, and the breach is only an act of omission, the transition from the one to the other is easily made, and is in some cases imperceptible. Between the case of one man assaulting another with the intention of injuring him, and that of a trustee through an error in judgment losing part of the trust funds, there is a wide distance: but the principle recognised in the first, that a wrong action which is hurtful gives rise to a claim for remedy by way of damages, is equally applicable to the last.

While a civil delict is distinguished, on the one hand, from a criminal delict, it has to be distinguished, on the other, from breach of contract. In delict, the obligation or duty which has been broken is fixed by law independently of any communing or arrangement between the parties. Everyone is bound, apart from any undertaking, to respect the bodily safety and the reputation of his neighbour, to refrain from injuring him, either by design or negligence, and from defaming him. The obligation referred to in breach of contract, on the other hand, is not one imposed by law, but is voluntarily undertaken. The nature and extent of the right emerging on such breach, therefore, is determined by the obligation which the offending party undertook, and the amount of damages to be awarded depends on considerations entirely different from those in delict. The measure of damages in the former case has relation to the benefit to be obtained under the contract, and in the contemplation of the parties at the time: in the latter, damages are given for the result of the wrongful act, although the amount of injury caused may not have been capable of estimation beforehand. A negligent act may result in the death of a childless bastard, or in the death of a person with a wife and large family, in which cases the liabilities of the wrongdoer are very different, although the negligent act may be the same. Other points of distinction between contract and delict are, that each of a number of co-delinquents is liable to be sued for the whole damage caused: and the plea of all parties not called is not available, as it is in breach of contract (*Croskery*, 1890, 17 R. 697), that a discharge of one co-delinquent does not discharge the others, while the discharge of one co-obligant in contract discharges all (*Delaney*, 1893, 20 R. 509), and that there is no relief *inter delinquentes* (subject to exception), while there is among co-obligants (see CO-DELINQUENTS). Further, while injury suffered will confer a title to sue in delict, in breach of contract a pursuer must also show that he is a party to the contract.

These considerations render it of importance to determine whether a party is liable in contract or delict, but that question is often difficult to solve. In some cases it has been said that a party may rest his case either on contract or delict. This means that alongside a contract duty there exists also a common-law duty, which is not superseded by the fact of a contract (*Heaven*, 1884, L. R., 11 Q. B. D., 503, 507). The independent existence of this common-law duty is recognised by allowing a claim arising out of fault committed in the execution of a contract, although the person suing could not maintain an action either for implement of the contract or breach of it, as in the case of a father suing a railway company for the death of his son, through their fault, while travelling under a contract of carriage on their line (*Horn*, 1878, 5 R. 1055, 1061). On somewhat similar grounds, action has been allowed at the instance of a beneficiary against defaulting trustees (*Croskery*, 1890, 17 R. 697). But it has been refused to a beneficiary with only a contingent interest suing the law agent of the trust, who, as averred, had by his negligence caused the

loss of the trust funds (*Racs*, 1889, 19 R. (H. L.) 27, 33). This latter case seems to have been decided on the ratio that the failure of duty on the part of the law agent was a breach of contract only, and therefore actionable only at the instance of his employer, but that the failure on the part of the trustees was a breach of a common-law duty, existing independently of contract (see also *Croskery*, p. 700). Erskine, iii. 1, 12; Stair, i. 9. 1; Wharton on *Negligence*; Glegg on *Reparation*.

### **Delivery and Acceptance of Deeds.**—A. *DELIVERY*.—

(1) *General Rule*.—"A writing, while it is in the granter's own custody, is not obligatory; for as long as it is in his own power he cannot be said to have come to a final resolution of obliging himself by it" (Ersk. iii. 2. 43). It becomes obligatory only when it is delivered, *i.e.* when the possession of it is transferred from the granter, with his consent, to the grantee (it may be without his knowledge or consent—*Borthwick*, 1686, Mor. 7735; *Tennant*, 1869, 7 M. 936, per *Ld. Kinloch*), or to some one on his behalf (*Henry*, 1884, 11 R. 713; see also *McAslan*, 1859, 21 D. 511; *Byres*, 1626, Mor. 8405, 16990; *Glendinning*, 1634, Mor. 16992; *Boyd*, 1661, Mor. 16993). The delivery of a deed is not a matter of law, but a matter of fact (*Life Association of Scotland*, 1886, 13 R. 910), of which the ascertainment is frequently matter of great difficulty (see (4)–(7) below). No ceremony is required.

A bond, to which there are several co-obligants, may be delivered as to some and not as to others (*McGill*, 1628, M. 16991; *Cheyn*, 1679, 2 Bro. Supp. 242; see also *Life Association of Scotland*, *ut supra*, and cases therein cited); and, in a very special case, an obligation was held delivered as to the part of the sum actually advanced to the borrower, and undelivered as to the balance (*Mair*, 1850, 12 D. 748). See also *Leckie*, 1776, M. 11581, and App. *voce* "Presumption," No. 1; cf. *Stewart*, 1883, 10 R. 463.

As to delivery by post, see *Dowie & Co.*, 1891, 18 R. 986.

(2) *Exceptions to the Rule, which requires Delivery*.—(a) *Deeds containing a Clause dispensing with Delivery*.—"These are of the nature of revocable deeds: for the granter, by continuing them in his own keeping, continues a power in himself to cancel them; but if he do not exercise that power, they become effectual on his death. Death is, in such case, equivalent to delivery, because after it there can be no revocation" (Ersk. iii. 2. 44; cf. Stair, i. 7. 14; *More's Notes*, 408; Bell's *Prin.* s. 24; *Dickson*, s. 919; see *Elvis*, 1669, M. 16999, as to an instrument accessory to a deed containing such a clause).

(b) *Writings of a Testamentary Nature*, if unrevoked at the testator's death (Ersk., and Bell's *Prin. ut supra*; *McLaren, Wills*, s. 752).—The principle applies to deeds, which are testamentary in character, although not in form, *e.g.* an assignation or disposition under reservation of the granter's liferent, and power of disposal or alteration (*Hadden*, 1668, M. 16997; *Cochranes*, 1686, 2 Bro. Supp. 94; *Stark*, 1679, M. 17002), or of his power to alter only (*Young*, 1695, 4 Bro. Supp. 259); or a deed of entail containing a power of revocation (*Porterfield*, 1822, 1 S. 9). Further, the rule applies to an instrument in exercise of a power to alter reserved by deed (*Hamilton*, 1624, M. 4098; *McBride*, 1680, M. 17002).

(c) *Bonds and other Writings in Favour of Wife or Child*.—Such instruments, although undelivered in the granter's lifetime, are effectual after his death, if found in his repositories unrevoked (Stair, Ersk., and Bell's *Prin. ut supra*; *McLaren, Wills*, s. 760). The principle has been applied not only in the case of a father and his children (*Lord Cardross*, 1639, M. 11440, 16993; *Wallace*, 1624, M. 6344, 11440, 16989; *Stevenson*, 1677, M. 15475,

17000; *Adair*, 1725, M. 17006; *Monro*, 1712, M. 5052, 17006 (a foris-familiated son); *Aikenhead*, 1663, M. 16994 (a natural child), but to a bond by a mother to her daughters (*Hamilton*, 1624, M. 4098), and to a post-nuptial settlement by a husband in favour of his wife (*Lord Lindores*, 1715, M. 6126, 17006; cf. *Thomas*, 1879, 6 R. 607). But a wife's deeds in her husband's favour require delivery (*Lady Bathgate*, 1685, M. 6077, 11569, 17004; cf. *Kirkpatrick*, 1873, 11 M. 551, per *Id. Deas*). It may be that the circumstances of the case show that during his life the granter held the document as the delivered evident of his wife and family (*Rüdel*, 1750, M. 11577; *Forrest*, 1858, 20 D. 1201; *Gilpin*, 1869, 7 M. 807; *Smith*, 1884, 12 R. 186; cf. *Miller*, 1874, 1 R. 1107; *Thomas*, *ut supra*).

(d) *Deeds in which the Granter has a Reserved Interest*.—Where the granter has reserved his liferent, and retains possession of the deed, he is presumed to hold it, not because his intention is incomplete, but to secure the interest reserved (Ersk. iii. 2. 44; *Bruck*, 1831, 5 W. & S. 61; *Lockie*, 1776, M. 11581, and App. *voce* "Presumption," No. 1; *Spalding*, 1874, 2 R. 237). It has been observed (Dickson, s. 923; Menzies, *Conveyancing*, 3rd ed., 180) that in the cases of *Hadden* and *Stark* (*ut supra*), cited by Erskine and Tait respectively in support of the rule, there was a reserved power to alter. See also *Drummond*, 1749, M. 4874; Elch. "Forfeiture," No. 15: 1751, 1 Pat. App. 503.

(e) *Deeds which the Granter is under an Antecedent Obligation to execute* "are valid without delivery: for he in whose favour such deed is conceived, as he had a right to demand the granting of it, is also entitled to compel the granter to exhibit it after it is signed" (Ersk. *ut supra*; *Cormack*, 1829, 7 S. 868).

(f) *Mutual Obligations or Contracts* "signed by two or more parties for their different interests require no delivery, . . . because every such deed, the moment it is executed, becomes a common right to all the contractors" (Ersk. and Stair, *ut supra*; Bell's *Prin.* s. 84; *Crawford*, 1695, M. 12304, 16990; *Lockhart*, 1709, M. 8430; cf. *Hamilton*, 1833, 12 S. 206). The rule applies to a mutual deed executed in duplicate (*Robertson's Trs.*, 1873, 1 R. 323). As to deeds mutual in form, but unilateral in substance, see *Kirkpatrick*, 1873, 11 M. 551, 571, per *Id. Deas*; *Teniers' Trs.*, 1879, 6 R. 1111; and *Malcolm*, 1891, 19 R. 278, and cases there cited. As to the unilateral deeds of co-obligants, see above (1). As to deeds found in the hands of a depositary, see (6) (7) below. As to the delivery of decrees-arbitral, see ARBITRATION.

(g) *Deeds of Discharge or Transference endorsed upon other Deeds* are, it is thought, effectual without delivery. Non-delivery is, however, an element in proving *quo animo* the endorsement was made (Dickson, s. 926; Tait, 160; see *Cochran*, 1709, M. 12714; *Carrick*, 1787, M. 17009).

(3) *Equivalents to Delivery*.—Where the granter of a deed, in its nature irrevocable, records it for execution or publication, the presumption is that he intends it to be effectual as a delivered deed: and he who maintains that it is undelivered must make out a special case (Ersk. *ut supra*; *Bruce*, 1675, M. 11185, 17000; *Gordon*, 1771, M. 15579; *Lockie*, 1776, M. 11581, App. *voce* "Presumption," No. 1; *Dornie*, 1843, 6 D. 180; *Burnet*, 1864, 2 M. 929; *Tennent*, 1869, 7 M. 936), e.g. that the granter did not consent, or that it is doubtful whether he consented or not, or that, although he consented, he did not intend thereby to make the instrument an irrevocable delivered deed (*Tennent*, *ut supra*). The fact that a deed is registered for preservation only, forms but an element in the proof of delivery: and the weight to be attached to it depends upon the circumstances of the case (see *Dornie*,

*Burnet*, and *Tennent*, *ut supra*). As to cases where the deed is taken in the name of a third person, see (7) below.

An assignation is made effectual without delivery by intimation (*M'Lurg*, 1680, M. 845; *Jarvie's Tr.*, 1887, 14 R. 411), or by using diligence upon it in the assignee's name (*Dick*, 1677, M. 6548).

The judicial ratification by a wife of a deed does not make it a delivered deed (*Lady Bathgate*, *ut supra*; *Kirkpatrick*, per *Ld. Deas*, *ut supra*).

(4) *As to Delivery when the Deed is found in the Granter's Possession.*—A deed found in the granter's possession is presumed either not to have been delivered (*Dickson*, 1627, 1 Bro. Supp. 49; *Boyd*, 1661, M. 16993; *Cochran*, 1709, M. 12714; *Stanfield's Crs.*, 1696, 4 Bro. Supp. 344, with which comp. *Crawford*, 1807, M. App. "Moveables," No. 2), or to have been returned to him on payment or discharge (see *CHIROGRAPHUM APUD DEBITOREM REPERTUM*, etc.). These presumptions may be redargued by proof *prout de jure*, either where force or fraud is alleged (*Fithie's Children*, 1693, 4 Bro. Supp. 70; *Bugh and Jenkins*, 1710, M. 11410; *Edward*, 1823, 2 S. 431; *Knox*, 1862, 24 D. 1088), or where the special facts of the case, relative to the possession of the granter, as admitted or explained by him, are such as to render it desirable for the ends of justice that the inquiry should not be limited to his writ or oath (*Ferguson, Davidson, & Co.*, 1880, 7 R. 500; *Henry*, 1884, 11 R. 713). In cases to which these principles are inapplicable, the proof must be limited. See also TRUST.

(5) *As to Delivery where the Deed is found in the Grantee's Possession.*—*Erskine* (iii. 2. 43, following *Mackenzie*, *Inst.* iii. 2. 6; so also *Stair*, i. 7. 14, iv. 42. 8) observes that "after a deed appears in the custody of the grantee, the presumption of delivery to him is so strong that it can in no case be elided but by his own oath or writing; . . . and if the delivery be confessed by the granter, or his representatives, the deed becomes the absolute right of the grantee, not to be defeated under the pretence of its having been granted in trust, unless the trust be proved either by the signed declaration or by the oath of the trustee." This doctrine, however, "is not to be taken without qualification, otherwise it is not very clear on what ground an issue could be granted; for the matter would be reduced to a presumption in favour of the grantee, which is not the state of the law as an absolute proposition. A party may have possession of a deed, and the presumption of law may generally be that—that party being the beneficiary under the deed—it was delivered to him for the purpose of being so held by him. But that proposition may undergo many qualifications, and the whole circumstances of each case must be looked at" (*McAslan*, 1859, 21 D. 511). The distinction noticed above (4) as to the *modus probandi* obtains here also. See also *Dickson*, s. 938.

(6) *As to Delivery where the Deed is found in the Possession of a Third Person.*—The question for whom does the depositary hold is one of fact, which may be ascertained by proof *prout de jure*, save where the terms of deposition are expressed in a probative writing (*Cowan*, 1675, M. 12379; *Logan*, 1823, 2 S. 253). The depositary, if he be connected with one of the parties, *e.g.* if he be his agent (*Ersk.* iii. 2. 43; *Garden*, 1724, M. 3519; *Drummond*, 1749, M. 4874; 1751, 1 Pat. App. 503; *Logan*, *ut supra*), or a member of his family (*Fairly*, 1666, M. 12278; *Lady Traquair*, 1668, 1 Bro. Supp. 546), is presumed to hold for that party. Of course the presumption will yield to adverse facts (*Crawford*, 18 Nov. 1807, F. C.; *Hamilton*, 1842, 1 Bell's App. 736). A neutral depositary is presumed to hold for the granter or grantee, according as the deed is gratuitous or onerous (*Ersk. ut supra*, correcting *Stair*, iv. 42. 8; see *Sinclair*, 1707, M. 11572). In the former

case, the presumption is that the deed has been deposited under the tacit condition that it shall be returned to the granter, if he call for it during his life, and that, if he do not, it shall be delivered on his death to the grantee (Ersk. *ut supra*; Ker, 1676, M. 3248; cf. *Fairlie*, 1630, M. 11567, with *Holwell*, 1796, M. 11583, which is the subject of comment in *Maule*, 1830, 4 W. & S. 58). Whether the same presumption holds in the case of a deed put by the granter into the possession of one who is agent for both granter and grantee, is a question to which different answers have been given. Dickson (s. 943) and Erskine's latest editor (see *Inst.* iii. 2. 43, note (a)) answer it in the affirmative (see also Tait, 165). According to Erskine (*ut supra*, followed by Bell, *Prin.* s. 23, and approved in *Maule, ut supra*; see also *McCreath*, 1860, 22 D. 1551), the agent is presumed to hold for the grantee. It is thought that the import of the cases (see *Maule, ut supra*; *Browdie*, 1831, 10 S. 39; *Ramsay*, 1833, 11 S. 967; *Stewart*, 1842, 1 Bell's App. 796; *Mair & Sons*, 1850, 12 D. 748; *Collie*, 1851, 13 D. 506; *McCreath, ut supra*; *Geddes*, 1862, 24 D. 794) is well expressed in the words of Ld. Justice-Clerk Hope (*Maiklem*, 1842, 4 D. 1182; see also Menzies, *Conveyancing*, 178; M. Bell, *Conveyancing*, i. 103). He says: "I cannot lay down the law that the abstract fact of a man being agent of both parties—granter and grantee—makes the possession of agent necessarily and at once possession for the grantee, without inquiry into the facts attending the delivery, and showing the character impressed on the delivery. I think it is an inquiry in point of fact and actual intention. It may be easier to make out, when the holder is agent of both parties, that the deed was held for the grantee: but it is always an inquiry in point of fact,—on what footing, and for whose behoof, was the deed delivered, the inquiry involving presumptions more or less strong according to the facts, . . . and the burden of proof being shifted according to the facts."

In one passage of the *Institutions* (iv. 42, 8; cf. i. 7. 14), Ld. Stair observes that the allegation by the granter of a deed that it lay in the hands of a depositary for conditional delivery, can be proved only by the grantee's writ or oath, the terms of the condition being provable by the depositary's oath. The same view finds expression in another passage (i. 13. 4) in the first and second editions. In later editions (see *More's* ed., i. 13. 4) the statement is that "the deposition being acknowledged or proved, the terms whereupon it was made are not only probable by the creditor's oath, but by the depositor's, whose faith he followed: . . . but not by the witnesses inserted" (cf. Ersk. iii. 2. 43; and see *Lermouth*, 1624, M. 12376; *Hay*, 1624, M. 12378). The tendency of modern decisions appears to favour the admission of witnesses other than the depositary to prove that the deposition was made for conditional delivery (*Collie*, 1851, 13 D. 506; *Martini & Co.*, 1878, 6 R. 342; and see cases cited above (4)).

It is thought that an averment that the granter of a deed trusted it to the depositary, for the purpose of cancellation may be proved *prout de jure* (*McAlister*, 1874, 1 R. 958; *Anderson's Trs.*, 1883, 11 R. 35; see also *Falconer*, 1848, 11 D. 220, 1338; *Cunningham*, 1851, 13 D. 1376; *Winchester*, 1863, 1 M. 685; *Bonthrone*, 1883, 10 R. 779). See CANCELLATION. The older decisions are not uniform (see Dickson, s. 948).

(7) *As to Delivery where the Deed is taken in the Name of a Third Person.*—"When a man takes a title to property in the name of another absolutely, so long as he retains the document in his own hands the presumption of law is that it is a donation *mortis causâ*; and, although the power of disposal remains in the donor's hands, yet if he allow the title to remain in that state during his lifetime, the subject on his death belongs to the party

in whose name the investment was made. We have in the authorities examples of that in cases where persons have bought heritable properties, taking the disposition in favour of others. So long as such a purchaser retains the disposition in his own hands, he has power to alter the destination, and to get a new disposition from the seller, or to establish his right judicially. If he dies without doing so, the disposition is effectual as a donation *mortis causâ*. But if he delivers the disposition during his life to the person in whose name he has taken it, the donation is absolute" (*Kennedy*, 1863, 1 M. 1042, per Ld. Curriehill; cf. *M'Intosh*, 28 Jan. 1812, F. C., per Ld. Meadowbank). Thus if he expedite infestment upon the deed (*M'Intosh*, *ut supra*; see (2) above, and cf. *Stewart*, 1883, 10 R. 463, and *Rust*, 1865, 3 M. 378, commented on in *Gilpin*, 1869, 7 M. 807, and *Honeyman & Wilson*, 1886, 14 R. 163), or if he, in whose name it is taken, acts upon it in the character with which it invests him (*Spence*, 1826, 5 S. 18; 1829, 3 W. & S. 380), it is effectual and irrevocable. But if he keep it in his own possession, it remains subject to his control, and may be cancelled or recalled at his pleasure (*Hill*, 1755, M. 11580; *Balcaird*, 5 Dec. 1816, F. C.; *Gilpin*, *ut supra*; *Stewart*, *ut supra*; cf. *Johnstone's Trs.*, 1896, 23 R. 538). The same principles have been applied in the case of stock certificates and debenture bonds or certificates of debt, issued by a public company or by the trustees of public works (*Walker's Exr.*, 1878, 5 R. 965; *Buchan*, 1879, 7 R. 211; *Dewar or Milne*, 1880, 8 R. 83; *Connell's Trs.*, 1886, 13 R. 1175), and of policies of insurance (*Jarvie's Tr.*, 1887, 14 R. 411; see *Jamieson*, 1880, 7 R. 1131). The destination, in such cases, where there has been no delivery, becomes operative only on the death of the person who caused it to be inserted (*Walker's Exr.*, *Buchan*, *Dewar or Milne*, *Jamieson*, *Connell's Trs.*, *ut supra*). The case of a deposit receipt is altogether different. See DONATION, PRESUMPTION AGAINST. Where the disposition, taken in the name of a third person, bears on the face of it that the person taking it is trustee for the disponent, it is effectual although the former retains it in his possession (*Gilpin*, 1869, 7 M. 807; *Stewart*, 1883, 10 R. 463). Again, it is observed by Ld. Stair (i. 10. 5) that "when parties contract, if there be any article in favour of a third party, at any time, *est jus quasitum tertio*, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform" (see *Blumer & Co.*, 1874, 1 R. 379, where there is a full citation of the authorities). Where an instrument taken in the name of a third person lies in the hands of a depositary, the question for whom does the latter hold is determined by the facts and circumstances of each particular case (*Milroy*, 1803, Hume, D., 285; *Collie*, 1851, 13 D. 506).

(8) *As to the Date of Delivery of a Deed.*—A deed is presumed to be delivered from its date, if it be in the hands of the grantee or of someone holding for him (Stair, i. 5. 6, i. 7. 14; Ersk. iii. 2. 43; Bell, *Prin.* s. 23; *Gordon*, 1757, M. 11165; affd. *sub nom. Forbes*, 1760, 2 Pat. App. 43), until it is proved that its date is inaccurate (see Dickson, ss. 718 *et seq.*). But the presumption does not apply where bonds of provision to children come into "competition with creditors, though their debts be posterior to the dates of the bonds of provision; unless the delivery thereof be proven anterior to the debts" (Stair, i. 7. 14; *Inglis*, 1676, M. 11567; *Simpson*, 1697, M. 11570; *Chiesly*, 1701, M. 11571; *Fraser*, 1754, M. 17008).

B. *ACCEPTANCE.*—It is always to be remembered "that delivery and acceptance are two entirely different things. There may be delivery full and complete, so far as the granter is concerned" (to the effect of binding

him), although made without the grantee's knowledge or consent (Stair, i. 10. 5; *Borthwick*, 1686, M. 7735), "leaving the acceptance still in the option of the grantee" (*Tennent*, 1869, 7 M. 936, per Ld. Kinloch). Acceptance is thus necessary only to make the deed effectual against the grantee (Ersk. iii. 2. 45). "The bare receiving it from the granter ought not, in reasonable construction, to infer acceptance: for where the granter of a deed gives it to the grantee without expressly tying him to acceptance, the natural presumption is that he leaves him at liberty to deliberate whether to accept or repudiate. Acceptance may be proved by the grantee's express declaration, either written or verbal; or by acts done by him after receiving the deed which import acceptance,—such as putting it into a public register, taking the benefit of certain clauses in it beneficial to himself, or otherwise using it as his own; all which acts may be proved either by writing or by the testimony of witnesses" (*Id.*, *ib.*; see also M. Bell, *Conveyancing*, i. 113). As to the case of deeds mutual in form but unilateral in substance, see A. (2) (*f*) *supra*. As to acceptance by post, see *Jacobsen Sons & Co.*, 1894, 21 R. 654, where it was held, following *Dunlop, Wilson, & Co.*, 1848, 6 Bell's App. 195, and *Household Fire Insur. Co.*, 1. R. 4 Ex. D. 216 (cf. *Mason*, 1882, 9 R. 883, per Ld. Shand, *contra*), that the posting of the letter of acceptance completes the contract. See CONTRACT.

[Dickson, *Evidence*, s. 916–964; Tait, *Evidence*, 156–173; Menzies, *Conveyancing*, 176–181, 563; M. Bell, *Conveyancing*, i. 102–113; Kirkpatrick, *Digest of Evidence*, ss. 112–116, 143, 145.]

See CHIROGRAPHUM APUD DEBITOREM REPERTUM: DEPOSIT RECEIPT; DONATION; DONATION MORTIS CAUSÂ.

## Delivery (Heritage).—See SASINE.

**Delivery of Moveables.**—Moveables, in Scotland, are either corporeal or incorporeal. Corporeal moveables comprehend such "as are palpable to sense: incorporeal such as consist in legal right merely" (Bell, *Com.* i. 100). Corporeal moveables (other than money) are called "goods" (Sale of Goods Act, 1893, s. 62 (1)), and it is to the delivery of such corporeal moveables that attention will be chiefly directed in the following remarks. It is to be observed, however, that the same general principles apply for the most part to the delivery of incorporeal moveables, such as debts, shares, etc., except that, as a rule, such incorporeal rights cannot be transferred without writing. See ASSIGNATION. Money, though in a sense a corporeal moveable, is representative of value or price, and is therefore placed in a category by itself.

The immediate subject of delivery may be either the moveables themselves, if corporeal, or some paper representative, such as a "document of title" or a bill of exchange. Bills of exchange, promissory notes, and cheques represent money (Bills of Exchange Act, 1882, ss. 3, 73, 83). Documents of title may represent moveables whether corporeal or incorporeal, but according to the usual definition they are confined to documents representative of "goods" in the sense above mentioned (Factors Act, 1889, s. 1 (4); Sale of Goods Act, 1893, s. 62 (1)). The transfer of such representative documents may be accomplished in all cases by an ASSIGNATION (*q.v.*), in most cases by indorsation, and in many cases (*c.g.* where the document orders delivery to bearer) by the mere passing of the document from hand to hand. In order to complete delivery, it is

often necessary, in addition to the transfer of the representative document, to give intimation to the custodian of the thing represented, and for this purpose a debtor or other obligant is treated as custodian.

"Delivery" has been defined by Statute as the "voluntary transfer of possession from one person to another" (Sale of Goods Act, 1893, s. 62 (1)). It has also by another Statute been defined as the "transfer of possession, actual or constructive, from one person to another" (Bills of Exchange Act, 1882, s. 2). The former definition is to be preferred, as by the word "voluntary" it rightly excludes transfers of possession arising from the death or bankruptcy of the previous possessor, and also transfers arising from unlawful acts, such as theft. Nothing of value is added to the definition in the Bills of Exchange Act by the words "actual or constructive," which merely denote modes of possession.

The definition, even in its improved form, is wanting in precision, for it depends upon the meaning of the ambiguous term "possession," which has been the subject of much learned exposition and discussion, (see, *e.g.*, Savigny, *Possession*; Pollock and Wright, *Possession in the Common Law*; O. W. Holmes, *The Common Law*). Erskine defines possession as "the detention of a subject with the *animus* or design in the detainer of holding it as his own property" (*Inst.* ii. 1. 20); and, consistently with this definition, he speaks of tradition as "the delivery of the possession of a subject by the proprietor with an intention to transfer the property of it to the receiver" (*Inst.* ii. 1. 18). This, however, is an imperfect view, for it excludes many cases in which possession is held on a title short of ownership. "Possession may be precarious, as of deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a [servant] carrier or factor. Mere possession without a just title gives no property" (per Lord Loughborough in *Lickbarrow*, 1790, 1 Bl. H. 357, at 360). No doubt possession, in the absence of any obvious subordinate title, gives rise to a presumption of ownership. Bell speaks of possession as the "badge of property in moveables" (*Com.* i. 269), and of delivery *de manu in manum* as "the true and proper badge of transferred property" (*Com.* i. 178). See REPUTED OWNERSHIP. On the other hand, even Bell is compelled to admit that "an adherence to this plain and simple rule is utterly impossible amidst the complicated transactions of modern trade" (*Com.* i. 178). All modern writers recognise two distinct forms of title arising from delivery: (1) absolute, as in sale; (2) qualified, as in pledge, hiring, carriage, etc. In England, contracts of the latter class are called "bailments," the owner being called the bailor, and the person intrusted with the possession being called the "bailee." Where the transfer is by way of ownership, the right conveyed is known in England as the "absolute property,"—sometimes called the "general property,"—as distinguished on the one hand from a "special property," and on the other hand from mere lawful possession. A special property in goods implies a right to retain for a time as against the true owner, as in the contracts of pledge and hiring, while simple possession without ownership implies a power in the holder of the absolute property to determine the contract at any time, as in agency, and sometimes in carriage.

#### I. DELIVERY INVOLVING CHANGE OF OWNERSHIP.

This applies to barter, sale, and donation.

1. *Barter or Exchange*.—In this case delivery is of greater importance in Scotland than in England. The Sale of Goods Act, 1893, does not include exchange,—a clause explanatory of the contract, and making the Act applicable to it, having been deleted in the passage of the Bill through



Parliament. The common law of Scotland, differing from that of England, made delivery necessary to the completion of every contract involving a change in the ownership of moveables; and though in sale this has been altered by the Act referred to, the old rule seems still applicable to exchange. It has further been suggested that, even in the matter of the passing of the *risk*, delivery is necessary in Scotland under the contract of exchange, though it has not been necessary in sale, at least since the time of Stair (see Brown, *Sale of Goods Act*, 1893, 39, 40).

2. *Sale*.—Rules as to delivery form part of the codified law of sale (*Sale of Goods Act*, 1893). In the normal contract the exchange of possession for a price is simultaneous,—delivery and payment being concurrent conditions (s. 28). There may, however, be modifying conditions, either express or implied (ss. 27, 29). The price may be paid before delivery, or delivery may precede payment, in the form of credit. If, in a sale for ready money, the buyer, by error or fraud, receives the goods without making payment of the price, no credit is given, and no property passes to the buyer (Bell, *Com.* i. 258; Benjamin, 282, 304); but if credit is once allowed, even if it is obtained by fraud or misrepresentation, the goods are the property of the buyer, and may be validly transferred by him to a third party, or appropriated to his general creditors (*Richmond*, 1854, 16 D. 403). The terms of the contract, express or implied, usually determine the question whether the seller is to send the goods to the buyer, or whether the buyer is to send for the goods to the seller. Apart from contract, it is the buyer's duty to send for the goods to the seller's place of business, if he has one, and if he has none, then to his residence. In the case of specific goods, which at the time of the contract both parties know to be in some place other than the seller's place of business or residence, that other place is the place of delivery (*S. of G. Act*, 1893, s. 29 (1)). Where the seller is to send the goods, but no time is fixed, they must be sent within a reasonable time (s. 29 (2)). Where, under the contract, it is the seller's duty to put the goods into a "deliverable state," the expense must be borne by him (s. 29 (5)). In regard to wrong quantities, if the seller delivers less than the contract quantity, the buyer may reject; but if the buyer accepts, he must pay for the goods at the contract rate (s. 30 (1)). If the quantity delivered is in excess of the contract, the buyer may accept the contract quantity and reject the rest, or he may reject the whole. If he accepts the whole, he must pay for the whole at the contract rate (s. 30 (2)). Where, on delivery, the contract goods are mixed with others not under the contract, the buyer may accept the goods under the contract and reject the rest, or he may reject the whole (s. 30 (3)). Unless otherwise agreed, the buyer is not bound to accept delivery by instalments (s. 31 (1)). Where the contract provides for instalments, to be separately paid for, a breach of contract by either party in respect of one instalment may or may not amount to a breach of the whole contract: "it is a question, in each case, depending on the terms of the contract and the circumstances of the case" (s. 31 (2)). Where, in terms of the contract, the seller is to send the goods to the buyer, delivery to a carrier for transmission to the buyer is *prima facie* a delivery to the buyer himself (s. 32 (1)). Where the seller delivers to a carrier, he must make such a contract with him as may be reasonably necessary for the safety of the goods; and if he fail to do so, and the goods are lost or damaged, "the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages" (s. 32 (2)). Where goods are sent by "a route involving sea transit," the seller must give such notice to the buyer as will enable him to insure them during the sea transit,

and on failure, the goods are at the seller's risk (s. 32 (3)). Formerly, in Scotland, where, in terms of the contract, goods were to be delivered by the seller elsewhere than at the place they were in at the time of sale, the seller undertook the whole risk of the transit (Bell, *Com.* i. 474), but the common law of England excepted such deterioration as was necessarily incident to the course of the transit. This is now the statutory law of the United Kingdom (S. of G. Act, 1893, s. 33). Where a tender of delivery is made, the buyer is entitled to a reasonable opportunity of examining the goods "for the purpose of ascertaining whether they are in conformity with the contract" (s. 34 (2)). Goods delivered are not held to be accepted by the buyer unless he has had such reasonable opportunity (s. 34 (1)), or unless he has intimated his acceptance to the seller, or has done some "act in relation to the goods which is inconsistent with the ownership of the seller," or has retained them without intimating his rejection (s. 35). Where the buyer rightfully refuses to accept delivered goods, he is not bound to return them to the seller, an intimation of rejection being sufficient (s. 36). If the buyer wrongfully neglects or refuses to accept delivery, he is liable to the seller for any loss occasioned by such neglect or refusal, and also for a reasonable charge for care and custody (s. 37).

Delivery upon a sale of goods may be "actual" or "constructive." Actual delivery (sometimes called "real delivery") "places the thing sold within the grasp and in the personal apprehension of the buyer or of his servants, clerks, and others whom the law identifies with him and considers as his hands" (Bell, *Com.* i. 181; Ersk. ii. 1. 19, iii. 3. 8). Constructive delivery involves a change of constructive possession, without any change in the actual custody. This takes place chiefly where the goods sold are in the hands of a third person, such as a carrier or warehouseman, whose possession, formerly held for the seller, will, after constructive delivery, be attributed to the buyer. In Scotland, before the recent change in the law, actual delivery was only dispensed with under the pressure of necessity, and Bell enters an emphatic protest against the admission of constructive delivery, in any case where the necessity is not of an "absolute kind" (*Com.* i. 182). There has, however, been a gradual relaxation of the strict rule. Under the Factors Act, 1842, and still more clearly under the Factors Act, 1889, an enlarged scope has been given to the expression "document of title," by means of which constructive delivery may be made in many cases where it was formerly incompetent. See DOCUMENT OF TITLE; ASSIGNATION. The definition of "document of title" contained in the Factors Acts is imported into the Sale of Goods Act, 1893 (s. 62 (1)), and is wide enough to cover every document by which constructive delivery is usually effected. The Act last mentioned introduced into Scotland the English principle of "attornment." It had been previously held, in Scotland, that it was the *notice* to the custodier which operated the transfer of the property (Bell, *Com.* i. 194; *Black*, 1867, 6 M. 136, per Inglis, L. P., at 141); but it is now enacted that, apart from the effect of such documents of title as do not require intimation, there is no delivery by seller to buyer until the custodier acknowledges to the buyer that he holds the goods on the buyer's behalf (S. of G. Act, 1893, s. 29 (3)). One of the effects of the change introduced into the Scots law of sale by substituting intention for actual delivery in passing the ownership of goods, has been to render constructive delivery possible though the goods are not in the hands of a middleman, but remain with the seller. In such cases the seller holds as bailee for the buyer to whom the property has passed. This follows from sec. 17 of the Sale of Goods Act, 1893, and is recognised elsewhere in the Act, as in secs. 20 and

25. At one time constructive delivery was applied to cases of stoppage *in transitu* (Bell, *Com.* i. 229, 233). So far as Scotland is concerned, this view was corrected by a judgment of the House of Lords in 1849, in which severe comments were made upon the opinions delivered in the Court of Session (*McEwen*, 6 Bell's App. 340). The Scottish Court, in a subsequent case, retorted that if they had been misled, it was owing to a long series of English decisions to the same effect (*McLrose*, 1851, 13 D. 880). Constructive delivery is sometimes treated as identical with, or at least as embracing, "symbolical delivery" (*e.g.* Ersk. ii. 1. 19, iii. 3. 8; Addison, *Contracts*, 9th ed., 522; *Manton*, 1796, 7 T. R. 67; *Chaplin*, 1800, 1 East, 192, per Kenyon, C. J., at 194). It may be doubted, however, if, apart from a document of title, there can be symbolic delivery of moveables. The instance commonly given is that of the delivery of the key of a warehouse or of a chest containing the articles intended to be delivered (*e.g.* Brodie, *Notes to Stair*, 869), but this has been shown to be actual delivery. The key is not a symbol of possession, but gives to the buyer access to the actual possession and power over the article, to the exclusion of the seller (Bell, *Com.* i. 186; Pollock and Wright, *Possession*, 60 *et seq.*).

3. *Donation*.—Where a gift is intended, delivery is of much greater importance than under the contract of sale. In the Scottish law of sale certain substitutes for delivery were recognised by the Mercantile Law Amendment Act of 1856, and since 1 January 1894 delivery may be entirely dispensed with, if such is the intention of parties (S. of G. Act, 1893, ss. 17, 18). But in regard to donation, and indeed in regard to all obligations and contracts other than sale, the old rule of the common law still prevails: *Traditionibus dominia rerum non nudis pactis transferuntur*. The rule that delivery is necessary to the validity of a gift of moveables holds equally in England (*Irons*, 1819, 2 Barn. & Ald. 551). No doubt it is competent in either country to give legal effect to a donation by means of a formal and delivered deed, and the same general rule may be applied to a testamentary bequest, which requires no delivery. In Scotland, but not in England, a gift may also be made by the delivery of a bill of exchange or other document representing money or goods, provided it is granted or endorsed to the intended donee, and is duly delivered (*Laur*, 1875, 3 R. 1192). In England, a gratuitous promise does not conform to the highly technical doctrine of "consideration," and will not receive effect even if contained in an agreement under hand or other instrument by which it is competent and usual to express a legal obligation. Nothing short of a deed under seal will be binding on the granter, and even this is a comparatively modern relaxation of the old law by which "no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery" (*Cochrane*, 1890, 25 Q. B. D. 57, at 72).

## II. DELIVERY FOR THE PURPOSE OF BAILMENT.

The English term "bailment" is comprehensive, and may be conveniently used for our present purpose. It is derived from the French *bailler*, to deliver, and imports "a delivery of goods for some purpose, upon a contract, express or implied that after the purpose has been fulfilled, the goods shall be re-delivered to the bailor, or shall be otherwise dealt with according to the bailor's directions, and shall in the meantime be kept till he reclaims them" (Stephen, *Com.* ii. 87). The contracts usually classed as bailments are pledge, deposit, agency, loan, and hiring, the last of which includes the contract of carriage and various minor contracts.

1. *Pledge or other Security*.—A security in Scotland may take the form (1) of an *ex facie* absolute transfer of proprietary right (*e.g.* *Hamilton*, 1856, 19 D. 152), in which case it will, on the principle of retention, carry future advances as well as those present and past, or (2) of an ordinary security for a present advance or for a specific existing debt. In either case a complete transfer of possession by actual or constructive delivery to the security-holder is essential. The transaction, though really a security, is often allowed to take the form of a sale, and when in this form it was held to come under the Mercantile Law Amendment Act, Scotland, 1856, and to be entitled to the same privileges, in questions of delivery, as an actual sale would have been in similar circumstances (*McBain*, 1881, 8 R. (H. L.) 106). But the sale sections of the Mercantile Law Amendment Act have been repealed by the Sale of Goods Act, 1893 (s. 60), and the new privileges which by the latter Act are allowed to sale (*e.g.* transfer of property without delivery) are expressly excluded from “any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security” (s. 61 (4)). The decisions prior to the Sale of Goods Act were inconsistent (*e.g.* *Pattison*, 1893, 20 R. 806; *Liddell*, 1893, 20 R. 989), but the terms of that Act seem conclusive (*Robertson*, 1896, 34 S. L. R. 82).

2. *Other Bailments*.—In these cases the question of delivery seldom presents much complexity. The intention being to transfer the possession for a time upon certain conditions, the conditions assume greater importance than the fact or mode of the transfer. It may be observed, however, that mere custody of an article does not necessarily imply possession in the legal sense, and hence such custody is not conclusive either as to ownership or bailment. It was at one time held, in England, that a servant intrusted with an article had possession as bailee of the master, and that therefore appropriation to himself was embezzlement or breach of trust, but did not involve the crime of larceny (*Watson*, 1788, East, P. C. ii. 562). It was, however, soon afterwards definitely settled that no possession passed to the servant, and that therefore such appropriation was a theft of his master's property (*Lavender*, 1793, East, P. C. ii. 566). This was but the reassertion of an older law, thus stated by Sir Edward Coke: “There is a diversity between a possession and a charge, for when I deliver goods to a man he hath the possession of the goods and may have an action of trespass or an appeal if they be taken or stolne out of his possession, but my butler or cook that in my house hath the charge of my vessel or plate hath no possession of them, nor shall have an action of trespass or an appeal as the bailee shall, and therefore if they steale the plate or vessel it is larceny” (*Inst.* iii. 108). Certain anomalies in this branch of English criminal law were removed in 1857 by the Act 20 & 21 Vict. c. 54, s. 4. See BREAKING BULK. Similar questions as between embezzlement and theft have arisen in Scotland, the crime to be charged depending upon whether the accused had the control and administration of the property (embezzlement), or had a bare custody (theft). The tendency of the more recent decisions has been to enlarge the scope of the more serious crime (*Macdonald*, *Criminal Law*, 3rd ed., 63).

**Delivery-Order.**—The phrase delivery-order is commonly used to denote two classes of instrument: (1) an order for the delivery of goods issued by their owner, and directed to the keeper of the warehouse in which they are stored; and (2) an undertaking to deliver goods, granted by a custodian, warehouseman, or manufacturer, whether the owner of the goods

or not. The particular forms of such documents vary with the custom of the trade in which they are used; the following examples are taken from cases which have occurred on the subject:—

DELIVERY-ORDER DIRECTED TO A WAREHOUSEMAN.

*Messrs. A. & Co., Greenock.*

Gentlemen,

You will please deliver to the order of *Messrs. B. & Co.*, 1526 bags sugar, *ex Eliza Leishman* from Mauritius, and understated.

(Signed) *B. & Co. (Melrose, 1851, 13 D. 880).*

ORDER OR WARRANT ISSUED BY A WAREHOUSEMAN.

The under-mentioned iron will not be delivered to any party but the holder of this warrant.

*The A. B. Co. Lim.*

No. 88.

Stacked at the works of the *A. B. Co.*, Sheffield, warrant for 403 tons iron rails. Iron deliverable (f. o. b.) to *Messrs. C. D. & Co.*, of London, or to their assigns, by endorsement hereon (*Merchant Banking Co.*, 1877, 5 Ch. D. 205).

It may be noted that the Stamp Act, 1891 (54 & 55 Vict. c. 39), draws a distinction between these instruments, the duty of 1d. being chargeable upon a delivery-order issued by the owner of goods (s. 69 and schedule), and a duty of 3d. on a warrant or order issued by the custodian of goods (s. 111 and schedule). Delivery-orders, whether issued by an owner or custodian of goods, are included in the definition of "documents of title" contained in the Factors Act, 1889, and adopted by the Sale of Goods Act, 1893 (see DOCUMENT OF TITLE: FACTORS ACT). The modern law as to the legal effects of their issue and transfer is largely governed by these Statutes.

*Effect of Transfer of Delivery-Order.*—A delivery-order addressed to a custodian of goods is, as a rule, granted as a step towards the transfer of the real right in these goods, by constructive delivery: a warrant or order issued by a warehouseman is intended to confer only a personal right to demand delivery, in virtue of which a real right may be obtained by taking actual delivery of the goods. Thus, when an order issued by the owner of goods is intimated to the warehouseman to whom it is addressed, the property in the goods is (subject to certain conditions discussed *infra*) transferred to the person who is in right of the order, to whom they are constructively delivered. When, on the other hand, the order is granted by the custodian, the grantee has only a right to demand delivery, and can only make his right real by taking actual delivery of goods (*Mathison*, 1854, 17 D. 274; *Anderson*, 1866, 4 M. 765; *Connal & Co.*, 1868, 6 M. 1095). The importance of this distinction, in cases of sale, is greatly diminished by the provisions of the Sale of Goods Act, 1893, but it may still be of importance in questions relating to the pledge of delivery-orders.

The law relating to delivery-orders may be considered in two respects: (1) the effect of such documents as a means of transferring a right to the goods, or a right to demand delivery of them; and (2) the title acquired by an indorsee or other transferee in a question with the grantor of the order.

*As Assignations.*—When questions relating to delivery-orders first came before the Courts, there was some difficulty in recognising them (more particularly in the form of warrants) as an adequate means of transferring a right to goods. They were, as a rule, neither holograph nor tested, and the mercantile custom of recognising them as a means of transfer was at first regarded as doubtful (*Borill*, 1854, 16 D. 619; *affd.* 1856, 3 Macq. 1; *Mackenzie*, 1853, 16 D. 129; *affd.* 3 Macq. 22). In one case it was held that

the indorsation of a warrant for goods, which had originally been granted, and afterwards transferred, solely for the purpose of raising money, was not *in re mercatoria*, and did not confer on the indorsee any title to sue the granter (*Commercial Bank*, 1859, 21 D. 864). In a later case it was laid down by Lord President Inglis, that a delivery-order was a mandate or procuratory to uplift the goods, which, when granted for value, was a procuratory *in rem suam*, and equivalent to an assignation (*Pochin*, 1869, 7 M. 622; see also per Ld. Neaves in *Connal & Co.*, 1868, 6 M. 1095, at p. 1103; and per Ld. Adam in *Distillers' Co.*, 1889, 16 R. 479). The other judges were of opinion that a delivery-order, when granted *in re mercatoria*, was by custom of trade to be regarded as a symbol of the right to the goods, and there would seem to be now no doubt that the endorsement of such instruments is a habile method of transferring the right possessed by the indorser.

*Completion of Right of Transferee.*—The actual transfer of a delivery-order, however, is only a step towards conferring upon the transferee the right of the transferor. The method by which this right must be completed varies according to the right which the transferor possessed. If he is the actual owner of the goods, the right of the transferee must be completed by delivery, actual or constructive; if he is the creditor in an obligation to deliver the goods, it must be completed by intimation to the party who is debtor in that obligation. Until such completion, the right of the transferee is merely a personal claim, which would not enable him to vindicate his right to the goods in the event of the bankruptcy of the transferor, or in a question with the creditors of the transferor attaching the goods by diligence (*Mathison*, 1854, 17 D. 274; *Anderson*, 1866, 4 M. 765; *Irvine*, 1896, 3 S. L. T. No. 571). This must be read subject to the provisions of the Sale of Goods Act, 1893, with reference to the transfer of the property in goods on a contract of sale (see SALE), but may still be taken as a statement of the law in the case where a delivery-order is transferred in security. It may be made clearer by an illustration. If A. sells goods situated in a warehouse to B., upon terms which make B. the owner of the goods, and B. pledges the delivery order to C., C. must complete his right of pledge, either by taking actual delivery of the goods, or by the constructive delivery effected by intimating his right to the warehouse-keeper (see DELIVERY OF MOVEABLES). On the other hand, if A. sells goods to B. on terms which give B. only a personal right to demand delivery, and no property in the goods, and B. pledges the delivery-order to C., the subject pledged is an incorporeal right, *i.e.* the right to demand delivery, and the pledge must be completed, as in other cases of pledge of obligations, by intimation to the person who is debtor in the obligation to deliver, that is, by intimation to A. (*Connal & Co.*, 1868, 6 M. 1095). These observations may be summed up by the statement that a delivery-order is not, like a bill of lading, a symbol of the goods, by the delivery of which the goods themselves are delivered; but only an instrument which will enable the holder, by adopting the appropriate procedure, to obtain a real right to the goods. The question whether this rule has been altered by sec. 3 of the Factors Act, 1884, is considered under the heading FACTORS ACT.

*How far Negotiable.*—In considering the title which a transferee of a delivery-order obtains in a question with the granter, it may first be observed that a document of this kind is not a negotiable instrument in the sense that a bill of exchange is. The position of a "holder in due course," *i.e.* of a person who has obtained a bill in good faith and for value, and has therefore a good title to it, whatever were the defects in the title

of his author, is not recognised in relation to a delivery-order. On the contrary, if the title of the indorser of a delivery-order is radically void,—if, for instance, he has stolen it, or has no right to be in possession of it,—the title of the indorsee is void (*Douglas*, 1715, M. 1397; *Colvin*, 1867, 5 M. 603; *Hamilton*, 1873, 1 R. 72). When the indorser had a right to the possession of the document of title, but no right to transfer it, the title of the indorsee may be maintainable under the Factors Act, 1889 (see FACTORS ACT), or on the ground that the granter of the delivery-order was barred from disputing it, either on account of the form of the order (cf. *Pease*, 1866, L. R. 1 P. C. 219), or because he had neglected to take precautions which were usual in his trade, and which would have prevented the fraudulent transfer (*Pochin*, 1869, 7 M. 622). There are certain dicta which seem to go further than this, and lay down the rule that a party, by granting a delivery-order, and thereby conferring upon the grantee an apparent power to dispose of goods, is barred from disputing the right of a party to whom the grantee has transferred the order (per Ld. Hatherley in *Vickers*, 1871, 9 M. H. L. 65; and see *Babcock*, 1879, 4 Q. B. D. 394). But the better opinion would seem to be that the mere possession of moveable goods does not necessarily raise any presumption that the possessor has authority to dispose of them, and that the possession of a symbol of the goods, such as a delivery-order, cannot confer any higher apparent right of disposal than the possession of the goods themselves (*Mitchell*, 1894, 21 R. 600; *Martinez y Gomez*, 1890, 17 R. 332; *Gillman, Spence, & Co.*, 1889, 61 L. T. 281). It has, however, been held in England, that the granter of a delivery-order owes a duty to the mercantile public not to issue delivery-orders in a form likely to mislead, and that, by the issue of an order, he is barred from refusing delivery of the goods to a person who has in good faith advanced money upon it. Thus, where a railway company issued by mistake two delivery-orders for the same parcel of goods, and these orders were so expressed that it was not obvious that they related to the same goods, it was held that the company was barred from denying that there were two parcels, in a question with a party who had advanced money on the security of both the delivery-orders (*Coventry*, 1880, 11 Q. B. D. 776).

A delivery-order has this characteristic of a negotiable instrument, that the granter may be barred from insisting, in a question with an indorsee, upon personal defences which would have been good in a question with the indorser. Thus if by custom of trade a particular order for goods is universally understood to mean a particular brand of goods, the granter of the order would probably be bound to supply that brand to an indorsee, even if the supply of some other brand would have sufficiently fulfilled his contract with the original grantee of the order (*Mackenzie*, 1853, 16 D. 129; affd. 3 Macq. 22).

*Effect of Transfer on the Rights of a Seller.*—A very important branch of the law in relation to delivery-orders is the question how far the transfer of such an order to a sub-purchaser or sub-pledgee affects the right of a seller of goods who has remained in possession of them, to retain them for debts due to him by the purchaser. In the case of a delivery-order issued upon a warehouseman, the common law was expiscated in a series of cases in which goods had been sold but no delivery had followed. In these cases it was held that the original seller could retain the goods, in a question with a sub-purchaser to whom the delivery-orders had been transferred, for (a) the price due to him by the purchaser (*McEwan*, 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340), or (b) for a separate debt due to

him by the purchaser (*McIrose*, 1851, 13 D. 880), or even (*c*) for a debt incurred to him by the purchaser after the date of the sub-sale, and at a time, therefore, when the purchaser had ceased to have any personal right to the goods (*McNaughton, Robertson's Tr.*, 1852, 14 D. 1010). It is doubtful whether a seller of goods, who had granted a warrant or obligation to deliver them, had a similar right of retention in a question with an indorsee of that warrant. In a case where an iron warrant was expressed as an unconditional promise to deliver to the bearer, it was held in the Court of Session that the granter of such an instrument was barred from asserting a right of retention for the price, in a question with an indorsee; but this principle was expressly disapproved in the House of Lords, where the case was affirmed on specialties (*Bocill*, 1854, 16 D. 619; *affid.* 1856, 3 Macq. 1; see also *Dimmack*, 1856, 18 D. 428). In a later English case, the question of a lien for the price was considered as still disputable (*Merchant Banking Co.*, 1877, 5 Ch. D. 205). The right of a seller of goods to retain them for debts other than the price, in a question with a sub-purchaser, was abolished by sec. 2 of the Mercantile Law Amendment (Scotland) Act, 1856, which, however, did not restrict the seller's right of retention in a question with a sub-pledgee, even if the latter were invested with the delivery-orders (as to this section, see *Wyper*, 1861, 23 D. 606; *Distillers' Co.*, 1889, 16 R. 479. It is repealed by the Sale of Goods Act, 1893). This section dealt with sub-sales, whether effected by means of delivery-orders or not. The provision by which a special effect is given to a delivery-order was first enacted in the Factors Act, 1877 (s. 5), reproduced in the Factors Act, 1889 (s. 10), and, in an altered form, in the Sale of Goods Act, 1893. This provision in the latest Act is as follows (s. 47): "Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that when a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee." This section gives to a delivery-order the effect of a bill of lading in a question with the original seller of the goods. It is doubtful, however, whether it is applicable to the case where the original purchaser, instead of transferring the document of title, intimates it to the warehouse-keeper, and issues new delivery-orders to the sub-purchaser or sub-pledgee. Is this proceeding equivalent to a transfer of the delivery-order in respect to the rights of the seller? (See conflicting opinions per *Ld. Rutherford Clark* and *Ld. Wellwood* (Ordinary) in *Browne & Co.*, 1893, 21 R. 173, and *Capital and Counties Bank*, 1896, 12 T. L. R. 216).

*Effect of Sale of Goods Act, 1893.*—It may be noted that the whole question of retention by a seller of goods in a question with a sub-purchaser rests, since the Sale of Goods Act, 1893, came into operation (1 Jan. 1894), on an entirely new footing. Prior to that Act the seller of goods remained the owner of them until delivery was taken, and his right of retention was a right founded on a right of property; under the Act the property in goods sold passes to the purchaser at the time when the parties intend it to pass, or, in the absence of any indication of such intention, on the



completion of the contract (ss. 17, 18), and a new and statutory lien on the goods for the price is conferred upon the seller as long as he is in possession of them, whether the property in them has passed to the purchaser or not (s. 41). It is this lien, and not the common-law right of retention (which can now exist only in cases where the conditions of the contract of sale were exceptional), which is excluded, under sec. 47 of the Sale of Goods Act, by a transfer of the delivery-order in pursuance of a contract of sale, and limited by its transfer in pursuance of a contract of pledge.

*Pledge of Delivery-Order.*—It would appear that a delivery-order cannot be pledged in the strict sense of that word, *i.e.* it is impossible for the owner of a delivery-order for goods to convey the order so as to confer upon a party advancing money a real right over the goods, without transferring the right of property in them. For the mere transfer of a delivery-order, not followed by any intimation to the custodier, will not confer upon the transferee any right which would give him any preference over the goods in the bankruptcy of the transferor (*Anderson*, 1866, 4 M. 765; *Irvine*, 1896, 3 S. L. T. No. 571); while if intimation is made to the custodier, it has been held that it results in the transfer of the property in the goods to the person making the intimation, whether his right to the order was that of a purchaser or of a pledgee (*Hamilton*, 1856, 19 D. 152; *Mackinnon*, 1868, 6 M. 974). The result is, that while a security may be given by the endorsement of a delivery-order followed by intimation to the custodier, that security is not a pledge of the goods, but an *ex facie* absolute transfer of them to the security-holder, subject to an obligation on his part to reconvey them on all debts due to him by the indorser being paid. The practical result of this doctrine is that a party to whom a delivery-order has been transferred in security, and who has completed his right by intimation to the custodier, may, on the bankruptcy of the transferor, claim a right over the goods in security not only of the advance for which the delivery-order was transferred, but also of any further debts due to him by the bankrupt (*Hamilton, cit.*). It is, however, declared by the Factors Act, 1889 (s. 3), that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods"; but the meaning and effect of this section is at present under consideration in a case pending before the whole Court (*Irvine*, 1896, 3 S. L. T. 511).

See FACTORS ACTS; DOCUMENT OF TITLE: SALE.

**Demembration** and mutilation of a member were regarded in former times as offences of the gravest nature. Indeed, an old Act of Robert II. (Stat. 11, No. 2) seems to make death the punishment of mutilation. Hume, too, points out that in some of our old Statutes (*e.g.* 1540, c. 118; 1579, c. 76; 1612, c. 3) the crimes of mutilation and demembration are either said to be capital offences, or are classed with such as are so. No instance, however, occurs in the records of a capital sentence having followed conviction of either of those crimes.

These offences would now be charged and punished as aggravated assaults.—[Hume, i. 330; Alison, i. 195; Ersk. iv. 4. 50; Macdonald, 158.]

**De minimis non curat prætor.**—The prætor does not concern himself about trifles, or, in other words, does not grant an equitable remedy in a matter of no moment. The remedies of the prætorian law were granted, and could be resorted to, only where the grievance was

considerable. Thus in sale, the special remedy, *actio redhibitoria*, in virtue of which a purchaser was entitled to have the thing sold taken back, and the price returned, on the ground of a defect in quality, was available only where the defect was serious. *Res bonâ fide vendita propter minimam causam inempta fieri non debet* (*D.* 18. 1. 54). In other words, in construing the edict—the *actio redhibitoria* was based on the edict of the curule ædile—the Courts held that mere trivial defects (*quæ contemni potuerunt*, *D.* 21. 1. 1. 8) afforded no ground for the application of the ædilician remedy (*D.* 21. 1. 4. 6; 21. 2. 37. 1). The remedy, indeed, was not available unless the defect in quality was so grave as to destroy or impair the usefulness of the thing sold for the purposes for which things of that kind are ordinarily intended to be used. Another illustration of the maxim in Roman law is found in the application of the remedy, *restitutio in integrum*, granted by the prætors to minors, who had suffered prejudice in some transaction. The prætor did not intervene or cancel a transaction (*restitutio in integrum*) unless the minor could show that the transaction in question had resulted in some actual prejudice to him. If no substantial injury were proved, the prætor allowed the transaction to stand (*D.* 4. 1. 4). So in Scotland, Erskine, speaking of minor's lesion, observes: "If it be inconsiderable, restitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occasions" (*Ersk. Inst.* i. 7. 36). As is pointed out by Stair (iv. 3, 1 and 2), the *nobile officium* of the Court of Session bears some resemblance to the power exercised by the prætor of supplying what is wanting in the common law, and correcting its stringency in special cases. The Court of Session, however, like the prætor in Rome, does not exercise this power unless the operation of the ordinary rules of law will result in material injustice or inconvenience. See NOBILE OFFICIUM.

The maxim is frequently written *De minimis non curat lex*. In this form, as in its other form, it has important applications. It is, for example, fundamental in the law of nuisance. In order to constitute a nuisance, there must be proof of substantial inconvenience or discomfort. "The word 'material' is of great importance; it excludes any sentimental, speculative, trivial discomfort, or personal annoyance of that kind—a thing which the law may be said to take no notice of, and have no care for" (per Ld. Selborne in *Fleming*, 1886, 13 R. (H. L.) 45). In the same case, Ld. Bramwell observed: "The word 'material' is one used continually in endeavouring to explain to a jury what it is which would constitute a nuisance, as distinguished from something which might indeed be perceptible, but is not of such a substantial character as to justify the interference of the Court, or allow the maintenance of an action in conformity with the legal maxim *Lex non facit delicatorem rotis*" (per Ld. Bramwell in *Fleming*, 1886, 13 R. (H. L.) 47). Instances of the application of the maxim occur in other departments of law (cf. Stair, iii. 2. 39).

At the same time, it is not correct to state, as a general rule, that law does not concern itself with matters of trivial importance. On the contrary, if there be a pecuniary or patrimonial interest, however small, depending upon the determination of a question, the parties have a right to invoke the aid of a Court of law to decide the question (per L. J. C. Inglis in *Strang*, 1864, 2 M. 1015). So the owners of a ship, who claimed damages for the unwarrantable arrestment of their ship, have been granted an issue, although they could not have sustained any substantial damage, inasmuch as at the time of the arrestment the ship was in the hands of a charterer, who was paying the owners for the use of it (*Meikle*, 1862, 24 D.

720). "It is of no consequence," observed L. J. C. Inglis in this case, "whether the pursuers have sustained any substantial damage. Suppose the damage to be such that one farthing is recovered, that will show that a wrong has been done by the defenders to the pursuers."

In construing imperative provisions of Statutes, the Courts are compelled to give effect to the statutory requirements, although in so doing it not infrequently happens that a comparatively trivial matter comes to have an undue importance attached to it. Thus, in *Thomson* (1856, 18 D. 470; affd. 1858, 21 D. (H. L.) 3), a deed was reduced upon the ground that it did not conform to the requirements of the Scots Act 1696, c. 15, in regard to pagination. To prevent the possibility of so trivial and technical an objection being taken against deeds in future, the Act 19 & 20 Vict. c. 89 was passed in the same year in which the decision in *Thomson* was pronounced. The maxim, however, has been applied even in the interpretation of Statutes. In construing the revenue laws, for example, it is well settled that, in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted. So, with reference to proceedings for a breach of the revenue laws, it was observed: "The Court is not bound to a strictness at once harsh and pedantic in the application of Statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing in the public interest, it might properly be overlooked" (per Sir Wm. Scott in *The Reward*, 1818, 2 Dodson's Adm. Rep. 265, at p. 269).

**Demise of the Crown**—The expression used to indicate the death of the reigning sovereign, and the transfer of the royal office to his successor.—There can, according to our law, be no *interregnum*, and the effect of the death of the sovereign is at once to transfer the office to the legal successor. It is in consonance with this theory that the death of the sovereign is spoken of as the demise of the crown.

The demise of the crown formerly brought about the dissolution of Parliament, but the law in this respect has been altered by various Statutes, beginning with 6 Anne, c. 7. The present state of the law on this subject is as follows. If there be a Parliament in existence at the demise of the crown, it is not determined or dissolved by such demise, but continues to its natural term, unless sooner prorogued or dissolved (50 & 51 Vict. c. 102, s. 51). The only effect of the demise on such a Parliament is that, if sitting, it must immediately proceed to act: if prorogued or adjourned, it must immediately meet and sit (6 Anne, c. 7). If the demise happen after the dissolution or expiration of a Parliament, and before the day appointed by the writ of summons for the assembling of a new Parliament, the last preceding Parliament must immediately convene and sit at Westminster, and be a Parliament for six months. If another demise occur within this period of six months, before the dissolution of this revived Parliament or before a new Parliament has assembled, the life of the old Parliament is again prolonged for six months from the date of such demise. If the demise happen on the day appointed by the writ for assembling, or after that day and before it has met and sat, the new Parliament must immediately convene and sit, and be a Parliament for six months, as in the preceding cases (37 Geo. III. c. 127).

**Demission.**—A clergyman of the Church of Scotland may resign or demit his office and his present charge; but before he is allowed to withdraw, the parishioners are cited for their interest. A main purpose of citation would seem to be to ascertain whether he may not have had recourse to resignation in order to escape the discipline of the Church; but the proceeding also affords him opportunity to reconsider a resolution which he may have adopted hastily and without any thought of avoiding inquiry into his conduct. If, after citation, no objection be offered by parishioners, or if the clergyman, on being conferred with by, or by order of, his Presbytery, adheres to his resolution, the Presbytery, after judging of the reasons of demission, must either accept the resignation tendered or proceed against the minister by libel or otherwise.

The General Assembly of 1758 declared Mr. Thomas Boston, who had demitted his charge, no longer a minister of the Church of Scotland.

The Presbytery of Edinburgh, in 1876, dealing with a letter from one of its clerical members (who was also the occupant of a professorial chair), intimating resignation of his parochial charge, and "demitting his orders and functions as a minister of the Church," accepted the resignation after a committee, who had been appointed to confer with their co-presbyter, had reported his adhesion to the intimation made. The Presbytery at the same time—three of their number dissenting—declared that "by his own act" the minister referred to "had ceased to be a minister of the Church of Scotland."

A beneficed clergyman, on appointment to a professorial chair in the Divinity Faculty of one of the four Universities, is entitled to be loosed from his charge forthwith.

**Demurrage.**—The term is applied to the sum payable by the charterer of a ship to the shipowner, as fixed by the charter-party, as compensation for the detention of the vessel in port beyond the "lay days," i.e. the period allowed without charge for loading or unloading the cargo, or for both of these purposes (see LAY DAYS). The charter-party usually specifies a rate per day or hour during which the vessel may thus be detained, either for a fixed number of days or hours, or in such terms as to cover any period during which the detention may continue. A period so fixed is itself sometimes called demurrage.

Where the detention lasts beyond the time stipulated, or where, in the absence of stipulation, it exceeds a reasonable time, the shipowner is entitled to "damages for detention,"—an unliquidated claim, which, as being "of the nature of demurrage," is properly included under that name (*Lamb*, 1882, 9 R. 482; *Harris*, 1885, 15 Q. B. D. 247). The damages in such cases are to be assessed according to all the circumstances. A liquid sum, fixed for demurrage by the charter-party, *prima facie* supplies the measure of damages for detention.

Under stipulations allowing a specified time, the charterer's obligation is absolute so as to render him responsible for non-fulfilment, unless the cause of it be one covered by an exemption contained in the charter-party, or unless it be due to the fault of the shipowner, or of those for whom he is answerable (*Hansen*, 1874, 1 R. 1066; *Postlethwaite*, 1880, 5 A. C. 599; *White*, 1886, 13 R. 524; *Granite S. S. Co.*, 1891, 19 R. 124; *Lilly*, 1895, 22 R. 278). Where no period is fixed, the charterer is under an implied obligation to load or unload within a reasonable period, which is to be estimated with reference to the state of business, and the facilities available at the port at that particular time (*Hick* [1893], A. C. 22). In many cases,

the charter-party, instead of specifying any period as "demurrage days," requires that the loading or unloading shall be according to the custom of the port, and in such cases the charterer is not liable for impediments arising out of that custom (*Wyllie*, 1885, 13 R. 92; *Castlegate St. Co.* [1892], 1 Q. B. 854; *The Alce Holme* [1893], P. 173). Stipulations as to lay days and demurrage are applied strictly to those ports to which by the terms of the charter-party they relate. In the case of other ports not provided for, a reasonable time is allowed.

The shipowner's obligation is to bring the vessel into port, and there place it at the disposal of the charterer. Until that is done and notice has been given, the stipulated period does not begin to run. "Demurrage days" begin to run from the expiration of the lay days, or, in the absence of provision, from the expiration of a reasonable time allowed for loading or unloading, as the case may be. They run continuously from that point, except where the custom of the port or the express agreement of the parties is to the contrary. "Working days" exclude Sundays and custom-house holidays; "running days" include every day, and "days" are presumed to mean "running days" (*The Katy* [1895], P. 56). Where the time is counted by hours, the period runs continuously, night and day. A fraction of a day or hour is counted as a whole day or hour.

*Demurrage and the Cesser Clause.*—By the "cesser clause" or "lien and exemption clause" in the charter-party, it is usual to extend the shipowner's common-law lien over cargo for freight, so as to cover also "dead freight and demurrage," while, in consideration of this remedy, the charterer's liability is made to cease from the shipment of the cargo. The extent of the lien and of the exemption depend upon the construction of the contract between the parties, and are to be gathered from the document as a whole (*Lockhart*, 1875, L. R. 10 Ex. 132; *Clink* [1891], 1 Q. B. 625, per Bowen, L. J., at p. 631). Where there is ambiguity, the Courts apply the rule that the extent of the shipowner's lien is the measure of the charterer's exemption. In applying this rule, difficulties have arisen as to whether the lien extends to unliquidated damages for detention, particularly at the port of shipment, the term demurrage being often used, in the lien clause, in the popular sense which includes such damages. In Scotland the Courts proceed on the principle that the term is to be taken in its strict sense, unless there is something in the charter-party to show that it is intended to have the wider signification (*Gardiner*, 1889, 16 R. 658, per Ld. Rutherford Clark, at p. 667). Accordingly, in the absence of express agreement, the lien does not cover unliquidated damages for detention at the port of shipment, and the charterer is not freed by the exemption in the cesser clause (*Lamb, supra*; *Salvesen*, 1886, 13 R. 85; *Gardiner, supra*). The Courts will, however, give effect to the contract according to its terms, even though the effect is to leave the shipowner no remedy under the contract. In England, in spite of some conflict of authorities, the more recent cases support the view taken in Scotland (*Bannister*, 1867, L. R. 2 C. P. 497; *Grey*, 1871, L. R. 6 Q. B. 544; *Kish*, 1875, L. R. 10 Q. B. 553; *Dunlop* [1892], 1 Q. B. 507; *Clink, supra*. See Scrutton, *Charter-Parties*, p. 118, where the cases are collected and examined).

Demurrage may be payable also under a bill of lading. Where, as in the case of a general ship, the bill of lading is the only document containing or proving the contract between charterer and shipowner, the holder of it receiving the goods is subject to its provisions respecting demurrage. Where the bill of lading follows on a charter-party, the provisions of the latter as to demurrage are frequently incorporated by reference in the

former (*Gullischen*, 1884, 13 Q. B. D. 317). Where the bill of lading contains no such provisions, either expressly or by reference, the consignee must use reasonable diligence in taking delivery of the cargo (*Fowler*, 1878, 4 Q. B. D. 299). And by the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, s. 1), every consignee of goods named in a bill of lading, and every indorsee, to whom the property in the goods passes, is subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself. (See BILL OF LADING.) In the case of a general ship, a consignee is not freed from liability for demurrage because the delay was caused by the consignees of other portions of the cargo (*Porteus*, 1878, 3 Q. B. D. 534).

[See Bell, *Com.* i. 621, ii. 95; Scrutton, *Charter-Parties*, 3rd ed., pp. 118-128, 232-244; Abbott, *Merchant Shipping*, 17th ed., p. 278; Carver, *Carriage by Sea*, p. 617.]

**Denizen.**—An alien born to whom the sovereign has granted the status of a British subject by letters patent.

Denization is described by constitutional lawyers as “a high and incommunicable branch of the royal prerogative,” and the term is sometimes said (Coke upon Litt. 129a) to be derived from Old French *donaison*, Latin *donatio*, “because his freedom is given unto him by the king.” The old use of denizen, however, as equivalent to inhabitant or native of the country, points to another derivation as more correct etymologically, namely, from Old French *deins* = Latin *de intus*, within, from which comes *denoizein* = denizen. Thus, in 1474, Caxton, *Chesse*, 2. 3. 104, says, “We be not *denizens* in the world but strangers, nor wee ben not born in the world for to dwelle and abyde alway therein but for to goo and passe through hit.” And so Coke upon Litt. (*ubi supra*) explains: “He that is born within the king’s ligeance is sometimes called a denizen, *quasi deins née*”; and adds, “but many times denizen is taken for an alien born that is enfranchised or denized by letters patent” (see Wharton’s *Law Lexicon*; Skeat’s *Etymological Dictionary*, and *The Oxford English Dictionary*, vocc “Denizen”).

The position of a denizen, in British law, is between that of an alien and a person naturalised by Act of Parliament, or under the Naturalisation Act of 1870 (33 Vict. c. 14), which provides (s. 13) that nothing contained in it shall affect the grant of letters of denization by Her Majesty. But the inducements to obtain British nationality by denization appear to be now limited to, on the one hand, avoiding the expense of a private Act of Parliament, and, on the other, dispensing with the five years’ residence and other requirements of the Naturalisation Act. A denizen becomes a British subject from the date of the grant; and so long as aliens could not take or hold British land, a denizen, the defect of heritable blood not being cured in him, could not inherit land, nor could his heirs born before his denization inherit it from him (Westlake, s. 285). Now that the contractual and proprietary disabilities of aliens have been almost entirely removed, this consequence of such a mode of acquiring British nationality has ceased to be of importance. The only practical difference now remaining between a denizen and a person who has been otherwise naturalised, appears to be that the former is still subject to the disabilities imposed by the Act of Settlement (12 & 13 Will. III. c. 2, s. 3), and is therefore incapable of entering the Privy Council or either House of Parliament, or enjoying any office or place of trust, civil or military, or taking a grant of lands from the Crown (Westlake, *ubi supra*). And in regard to the last-

named disability, it is pointed out (2 Steph. *Com.* p. 408), that as an alien now can, so apparently may a denizen also, take and hold British land. Thus Anson says (*Const.* ii. p. 72, note) that "since 1870 a denizen is in practically no better position than an alien," and, as Foote remarks (*Priv. Int. Jurispr.* p. 17), denization by letters patent is likely to fall into disuse.—[Black. *Com.* i. 374; Cockburn on *Nationality*, p. 28; Bacon, *Abr. Tit. Alien B.*; Bell, *Prin.* s. 2137]. See ALIEN; NATURALISATION.

**Dentists.**—The Act relating to dental practitioners is the Dentists Act, 1878 (41 & 42 Vict. c. 33), amended by the Medical Act, 1886 (49 & 50 Vict. c. 48), ss. 26, 23.

**Denunciation** signifies the proceedings by which a person was declared to be what is known in Scots law phraseology as a rebel, but is perhaps more aptly termed in the English law an outlaw. Denunciation against a person might follow on either a civil action for debt or a criminal action, and its effects were formerly highly penal, though in modern times they have been considerably mitigated. In civil cases it might be used against anyone who had disobeyed a charge attached to a decree; and in criminal actions, against (1st) anyone who, having been cited to appear in the High Court of Justiciary, did so accompanied by more than the number of friends and followers allowed by the Act of 1555, c. 41; or (2nd) anyone who, having been so cited, has failed to appear, and has had sentence of fugitation pronounced against him. The proceedings constituting denunciation were of a most public and formal character. In civil actions for debt, if the person to be denounced resided in Scotland, the denunciation had to be made by a messenger-at-arms at the market crosses of the city of Edinburgh, and of the head burgh of the county within which the person resided: while, if he were furth of Scotland, the pier and shore of Leith were substituted for the head burgh of the county. In criminal causes, denunciation for a breach of the Statute of 1555 was made at the market cross of the head burgh of the shire in which the Justiciary Court was sitting, and was registered in the books of the shire of the rebel's domicile, or in the Books of Adjournal of the Court of Justiciary: while if it followed a sentence of fugitation, it was effectual if made at the Market Cross of Edinburgh within six days of the sentence of fugitation (Act 1584, c. 140, and Act 1592, c. 126). The formalities of the denunciation opened by the messenger-at-arms crying three separate and audible *oyesses* in the presence of at least two witnesses. He then read publicly the letters containing the charge, and the execution of the charge on which the denunciation proceeded, and blew three blasts of the horn, by which the debtor or delinquent was understood to be proclaimed a rebel to the Crown for contempt of its authority. This blowing of the horn led to letters of diligence being called letters of horning, and to the use of the expression to "put a debtor to the horn." Not only had each of the above formalities to be carefully gone through, but they had to be separately specified in the execution returned by the messenger-at-arms as having been properly performed. Any omission to insert the solemnities in the execution invalidated the denunciation, and it was not competent to prove by witnesses that the forms had been properly observed, though slight omissions were occasionally overlooked. Within the space of fifteen days after the denunciation, the letters of

homing had to be registered in the Sheriff Court Books of the sheriffdom within which the rebel resided (Act 1579, c. 75), or in the Books of Council and Session (Act 1597, c. 269, and Act 1600, c. 13). In civil causes a simpler process has now been substituted for these formalities by the Personal Diligence Act (1 & 2 Vict. c. 114, ss. 9 and 10), and within a year and a day of the expiration of the days of charge in the warrant to charge attached to an extract of a decree of Court or of registration, it is now competent "to present the extract and execution of charge to the clerk of the Sheriff Court from which the extract has been issued, who shall thereupon record the execution in the register of homings kept by him, . . . : which registration shall have the same effect as if the debtor or obligant had been denounced rebel in virtue of letters of homing, and the said letters, with the executions of charge and denunciation, had been recorded according to the forms now in use, and shall have the effect to accumulate the debt and interest into a capital sum whereon interest shall thereafter become due." This accumulation of debt and interest into a capital sum is now the only penalty attached to denunciation for a civil debt, with the exception of the cases specially provided for in the Debtors Act of 1880 (43 & 44 Vict. c. 34), s. 4, where a penalty of twelve months' imprisonment may still be incurred in certain cases of failure of pay.

Formerly denunciation, whether following on a civil or criminal cause, deprived the rebel of all his personal and public rights as a member of the community. Having been declared rebel, he might be put to death by anyone with impunity. The Act of 1612, c. 3, rendered this illegal where denunciation followed on a civil cause: but it continued to be legal in criminal cases until 1661, when the law was mitigated, to the extent of its not being allowable to kill or mutilate a rebel unless he had been denounced on a capital charge, and was making a forcible resistance to those endeavouring to arrest him (Act 1661, c. 22). His whole estate was forfeited—his single escheat, or whole moveable effects, to the Crown; and his liferent escheat, or the income of his heritable property, to his superior, provided in the latter case that the rebel remained unrelaxed for a year and a day. Escheat upon denunciation for civil causes was only entirely abolished by 20 Geo. II. c. 50, and still subsists in the case of a rebel denounced for criminal causes.

Lastly, the rebel had no *persona standi in judicio*; but this disability, though not removed by Statute, is no longer favoured by the law, and according to Erskine (ii. 5. 60) this plea, which is a purely personal one, and cannot be pleaded against the rebel's assignee, even though the assignation be dated after the commencement of the action, would not be sustained against a rebel denounced on a civil debt.

[See Stair, iii. 3. 7; Ersk. ii. 5. 56; Bell, *Com.* i. 697, ii. 435; Bell, *Prin.* s. 2311; Bankt. iii. 3. 2; Hume, i. 187; Ross's *Lect.* i. 305; *Jurid. Styles*, iii. 370.]

See HORNING; IMPRISONMENT; DILIGENCE.

**Depending Action.**—An action is said to be depending, or in dependance, from the time it is begun until it is finally disposed of.

While an action is in dependance it is competent for the pursuer to use either INHIBITION (*q.x.*) or ARRESTMENT (*q.x.*) on the dependance; and also for the defender to plead *LIS ALIBI PENDENS* (*q.x.*), in another action between the same parties, on the same grounds.



An action is said to be begun when it is executed, but not till then; signeting alone being insufficient (Ersk. iii. 6. 3; *Aitken*, 1 M. 1038; *Alston*, 1887, 15 R. 78). When the execution is by means of a registered letter under the Citation Amendment Act, 1882, the date of posting the letter is the date of execution (*Alston, cit.*).

An action continues depending during an appeal to the House of Lords (Ersk. iii. 6. 3, ii. 11. 3; Bell, *Com.* ii. 145), and until there is a final decree disposing of the whole cause, including all questions of expenses (*Aitken*, 1 M. 1038; *Kennedy*, 1876, 3 R. 813). It also continues depending while it is asleep (*Denovan*, 1845, 7 D. 378).

Without being finally disposed of, an action may cease to be depending by abandonment. ABANDONMENT (*q.v.*) may be made by minute of abandonment (*Nelson*, 1874, 1 R. 1093), or in the summons (*Laidlaw*, 1834, 12 S. 538) or condescendence (*MacAulay*, 1874, 1 R. 307) of a new action. An extrajudicial letter of abandonment by an agent is not enough (*Nelson, ut supra*), though a letter by the pursuers was in one case sustained as a sufficient abandonment (*Gracie*, 1846, 19 Sc. Jur. 60). When the abandonment has been sustained by the Court, the action is at an end.

Actions may also cease to be depending by force of prescription. The Act 1669, c. 9, provides that "all actions proceeding upon Warnings, Spuilzies, Ejections, arrestments, or for Ministers' Stipends and others foresaids, shall prescribe within ten years, except the saids actions be wakened every five years." The "others foresaids" are "Miltars," "Mails and Duties of Tements," and "all Bargains concerning moveables or sums of money, provable by witnesses."

The Act 1685, c. 14, provides, with reference to the foresaid Act, that "all actions to be raised hereafter upon the foresaid grounds shall prescribe in five years if they be not wakened within that time." This has been held to mean that these actions prescribe if they have been allowed to be asleep for five years (*Graham*, 30 May 1811, F. C.). As to all actions not falling under this class, it seems to be laid down that they would prescribe if allowed to be asleep for forty years (Ersk. iv. 1. 8 and 62; *Aitken*, 1893, 1 M. 1038, per Ld. Deas); but Ld. Pearson in a recent case (*Rankin*, 1896, 4 S. L. T. 280) has held that the application of prescription is confined to actions founded on rights which are subject to prescription.

[Authorities cited, and Mackay's *Manual*, 226; Millar, *Prescription*, 159.]

**Deposition or Deposit.**—*Depositum*, in Roman law, was a contract by which the owner of a moveable (*depositor*) placed it in the charge of another (*depositarius*), to keep it gratuitously and restore it on demand. Both parties were bound to do all that was required by *bona fides*. The depositary was not entitled to make any use of the deposit, the contract by which a thing was lent for gratuitous use being *COMMODATE (q.v.)*. The depositary derived no benefit from the transaction, and was therefore liable only for *dolus* or *culpa lata*, unless he had come under a special undertaking for safe custody, when he was liable for ordinary neglect (*D.* 16. 3. 1. 35; *D.* 16. 3. 1. 6). The contract being for the benefit of the depositor, he was bound to exercise *omnis diligentia* that the deposit should cause no damage (*D.* 13. 7. 31), and had to pay all expenses incident to the custody of the thing, and the cost of carriage to and from the place of deposit (*D.* 16. 3. 12 pr.; *D.* 16. 3. 12. 1). The deposit could not be retained by the depositary as a set-off for any debt or claim due to him by the owner (Paul, *Sent.* 2. 12. 12; *C.* 4. 34. 11); but probably there was an

exception in respect of expenses incurred in connection with the thing itself. The depositor had the *actio depositi directa*; the depositary had the *actio depositi contraria*.

In the law of Scotland, deposit is essentially gratuitous, and is either *proper* or *improper*. (1) In *proper* deposit a specific subject is intrusted to the depositary, to be restored unimpaired, and with all its fruits and accessories. The possession and the property are effectually separated; the depositary's creditors have no claim on the subject, and if the depositary fraudulently sell the deposit, the owner can probably demand restitution from the purchaser (Bell, *Com.* i. 277; *Prin.* 211). There may also be proper deposit of fungibles and money, but they must be delivered as specific subjects, and kept distinct and capable of identification (Bell, *Com. supra*; Howard, 1762, 3 Burr. 1369, note). Bills and notes may be properly deposited; but if negotiable, their negotiation by the depositary must be rendered impossible (Bell, *Com. supra*). (2) In *improper* deposit, fungibles, such as money, are deposited to be returned in kind. In this case the real right passes as well as the possession, and the depositor can claim merely as a creditor on the depositary's estate (Bell, *Prin.* 211; *Com.* i. 277). "Where the deposited goods are extant and distinguishable, the depositor in all cases of *proper* deposit is entitled to have them set apart from the common fund, and delivered up to him. Where the subject deposited is not to be itself returned, but only in kind, the depositor is only a personal creditor" (Bell, *Com.* i. 278; and see Bell, *Prin.* 211).

The contract being gratuitous, the depositary is responsible, before the subject is demanded back, only for gross negligence, and not for slight neglect or ordinary accidents; and if the subject perishes, it perishes to the owner (*Coggs v. Bernard*, 1701, 1 Smith's L. C. 199; *Southcote*, 4 Co., Rep. 83, b; *Douglas*, 1665, Mor. 8541; Bell, *Com.* i. 277; 3 Ersk. 1. 26; Addison on *Contracts*, 770; Beven on *Negligence*, 894 *et seq.*). The care which must be bestowed on the deposit is such as men of ordinary prudence might be presumed to exercise in regard to subjects of a similar description. The precise degree of diligence requisite is only to be ascertained on a consideration of the intrinsic value and nature of the deposit; but it is not necessarily a good answer to a charge of gross neglect, that the depositary kept the deposit as he kept his own goods, and that the latter were lost along with it (*Doorman*, 1834, 2 A. & E. 256; *Rooth*, 1830, 1 Barn. & Ald. 59; Bell, *Prin.* 212), for the test of diligence is not what a particular man does, but what the average man may be expected to do in given circumstances. If the deposit be a locked or closed box, with the contents of which the depositary is unacquainted, he must take such care of it as its appearance suggests (3 Ersk. 1. 26; *E. Cassilis*, 1626, Mor. 3452); but if to his knowledge the contents are of special value, he will be responsible for exposing the box to risk or treatment inappropriate to the nature of the contents (*Coggs, supra*; Addison, 771). It has been said that a distinction is to be observed between the simple deposit for *custody* and deposit for *safe keeping*, the latter implying a greater degree of care, as in the case of jewels or other valuables deposited in a bank while the owner is abroad (Bell, *Prin.* 212). But this is hardly established by the decisions. Apart from special stipulations, by which any contract of deposit may of course be qualified, it appears that the requisite degree of care varies—at least according to English and American law—not so much with the purpose as with the nature of the deposit, and the law as to gratuitous deposit with bankers is thus stated by Addison (6th ed., p. 406): "It is the custom of bankers to receive and keep for the accommodation of their customers

boxes of plate and jewels, wills, deeds, and securities; and, as no charge is made for the keeping of these things, they are gratuitous deposits. The bankers, therefore, are only bound to take ordinary care of them; and if they are stolen by a clerk or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant." So in the leading case of *Giblin v. M'Mullen* (1868, L. R. 2 P. C. 317), where a customer left in the custody of a bank debentures which were abstracted from a strong-room and made away with by the cashier, it was held that the bank, as a gratuitous bailee, was not bound to exercise more than ordinary care of the deposits intrusted to it. "The negligence, for which alone they could be made liable, would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs" (per Ld. Chelmsford in *Giblin, supra*). But if the deposit is in the way of the bank's ordinary business, or if the bank receives any consideration by way of commission or otherwise, or has a lien over the deposit for a general balance, the character of the contract is changed, and the bank becomes liable for ordinary negligence (in *re United Service Co., Johnston's Claim*, 1871, L. R. 6 Ch. 212). And it has been suggested that, looking to the modern and almost universal practice of bankers to take charge of valuables for their customers gratuitously, the doctrine of their liability requires modification. Bankers give facilities to customers which they would not extend to others without a charge, and it may reasonably be said that this is done so much in their own interests as to make it part of their ordinary business, and so to extend their liability. "Can it fairly be said that the position of a banker, taking charge of securities for a customer, is identical with that of a man intrusting his gold watch to a friend, or locking up his deed-box in a neighbour's house while he goes out of town? Unless the position is identical, the banker can only be described as a gratuitous bailee in a strained and somewhat unnatural sense" (Beven on *Negligence*, 1563).

The contract is completed by delivery, actual or constructive. A mere promise to deliver or to receive is not sufficient, but any clear manifestation of intention to take charge of a thing which is incapable of manual delivery, but which is at the disposal or in the control of the promisor, will constitute deposit (Addison, p. 770; and see *Stiven*, 1874, 1 R. 412). But a person cannot be made a depositary against his will or without his consent. Thus, if a tradesman or other person voluntarily and without request send goods to a house where they are taken in without the knowledge or consent of the owner, the latter does not become the depositary of the goods (*Lethbridge*, 1819, 2 Stark, 544; Addison, 770; Chitty, 514). Where a manuscript play was sent unsolicited to a theatrical manager, and lost by the recipient, it was held that "there was no case to go to the jury, for the plaintiff had chosen voluntarily to send to the defendant what the defendant had never asked for, and no duty of any sort or kind was cast upon the defendant with regard to what was so sent" (per Williams, J., in *Howard*, 1884, Cab. & El. 253). But this case, as reported, is thus criticised by Mr. Beven: "If this judgment is correct, the whole law of deposit is wrong. As soon as the defendant received the deposit, he became amenable to the rules of law regarding deposit: he was bound to slight diligence, he became liable for gross negligence. He might have avoided liability by refusal to accept, by absolutely ignoring the thing sent, or by immediately returning it. In the event of his acquiescing in the receipt, he could not be regarded as in any better position than a *finder* of the

play, who has his choice to pass it by or take it up; in which latter case he would be required to answer for gross negligence" (*Negligence in Law*, 907).

In proper deposit the depositary has no right without permission, express or implied, to make use of the deposit, and if he does he will be liable for any resulting damage or deterioration. Permission to use is sometimes implied from the nature of the subjects, as in the case of sporting dogs or horses. The best general rule on the subject is, according to Story, to consider whether there may or may not be an implied consent on the part of the owner to the use: if the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to his injury, or perilous, it ought not to be presumed. And if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable (Story on *Bailments*, s. 90). A depositary is not entitled to penetrate or disclose secrets by breaking open locked boxes or packages confided to him (Bell, *Prin.* 212; and see *Logan*, 1823, 2 S. 253).

*Joint Depositaries* are liable *in solidum* for the restoration of the deposit (Bell, *Prin.* 212; 3 Ersk. 1. 26; *E. of Dundonald*, 1869, L. R. 7 Eq. 504); but a depositary is not bound to restore a thing intrusted to him by two or more persons on the demand of one of them (Addison, 744). Restoration cannot be refused on the ground that the depositary believes that the article is truly the property of another than the depositor (*Gelot*, 1871, 9 M. 957), although if a third party claim the deposit, the depositary ought to retain custody of it until the question of right is decided (3 Ersk. 1. 27). Eviction by the true owner is a good defence (*Gelot, supra*; Addison, 775).

A depositary is entitled to reimbursement and recompense for any necessary expense or loss occasioned by the contract, and he may retain the deposit until he is fully indemnified (3 Ersk. 1. 27; *E. Bedford*, 1662, Mor. 9135. In England, a gratuitous bailee does not appear to have even this right of retention (Addison, 778)). But a depositary has no right, either in proper or in improper deposit, to plead compensation and retention for a debt which has no relation to the subject of the deposit (Ersk. *supra*; *Scot*, 1697, Mor. 2628; *Cred. of Stuart*, 1709, Mor. 2629; *McGregor*, 1887, 14 R. 535). Thus, bankers have no general lien, for previous or subsequent debts, over valuables or scrip contained in locked boxes and deposited with them gratuitously and merely for safe custody (*Leese*, 1871, L. R. 17 Eq. 224; and see *Robertson's Trs.*, 1890, 18 R. 12).

If the depositary wrongfully refuses or delays to restore the deposit on demand, the nature of the contract is altered, and he becomes liable for even casual misfortunes or loss, "unless it shall appear that the deposit would have perished, or have had the same chance of perishing, though it had been redelivered to the owner when he called for it" (3 Ersk. 1. 26).

The depositor is bound to reimburse the depositary for all necessary charges and expenses, and to receive back the deposit. If he choose to employ a depositary to his knowledge reckless or incapable, he must himself bear any consequent loss.

See CARRIER; CONSIGNATION; DEPOSIT - RECEIPTS; RAILWAY; SHIP; SEQUESTRATION; TRUST; INNKEEPER.

**Deposit Receipts.**—The form in which deposit receipts are issued by banks to their customers, in exchange for money lodged with them

on deposit, as distinguished from money lodged on current deposit account, is generally in the following terms:—

Bank of . . .  
Deposit Receipt.

[Place and date.]

£ . . .  
Received from . . .  
which is placed to . . . credit on deposit receipt.

“When the money is to be drawn, this receipt must be returned, with the signature of the depositor on the back.”

The main distinction between the contract of a bank with its customers when the money is lodged on current deposit account, as distinguished from deposit receipt, is that whereas the bank is bound to honour a cheque drawn on the current deposit account, if there is sufficient money to meet the cheque, no such obligation exists in the case of deposit receipts, where the bank is only bound to pay in terms of the express contract.

*Stamp Duty.*—Where the deposit receipt bears that the money is to be accounted for to the person from whom it is received, it is exempt from stamp duty. In all other cases the receipt is liable to one penny of stamp duty. The discharge of the receipt in all cases is liable in a similar duty.

*Payment of Receipt.*—The bank are bound to pay the receipt on demand, but only on the fulfilment by the depositor of the terms of the contract. If they refuse to do so, they are liable in damages. The bank are safe to pay the proceeds of the receipt to any person who presents it blank endorsed by the depositor, or to any special endorsee, and are not concerned with questions between the person thus presenting it and the original payee. Possession of an endorsed deposit receipt does not *per se* confer on the possessor any right of property in the funds represented by it. It merely implies a mandate to uplift the fund on behalf of the owner. Like other mandates this falls by the death of the mandant (see MANDATE: DEATH). If payment be made in ignorance of the death, the bank cannot be compelled to pay a second time. As a bank is accountable to the depositor, it is the duty of the bank to be satisfied as to the identity of the person to whom repayment is made. In the case of a payment to a wrongful holder, the bank is liable to the depositor, unless they can show that the depositor has been guilty of fraud, or of such negligence that the responsibility for the wrongful payment is with him (*Forbes*, 1854, 16 D. 807). While payment in terms of their contract discharges the bank, the terms of a deposit receipt do not in any way determine the property in the money represented by it, nor have they any testamentary operation or effect, though they may be important elements as indicating the intention of the depositor (*Crosbie's Trs.*, 1880, 7 R. 823; *Macdonald*, 1889, 16 R. 758; see also DONATION).

*Receipts payable to either of two Persons or Survivor.*—Such receipts are discharged by the indorsation of either of the parties during their joint lives, or of the survivor on the death of one of them, or, on the death of both, by the executors of the last survivor. Where a deposit receipt is issued in such terms, and an arrestment is used against one of the parties, it is not clear that the arrestment attaches any part of the sum in the receipt, but a bank would probably not pay, nor would they be safe in paying, until the arrestment is withdrawn (*Bank of Scotland*, 1870, 8 M. 391). In the same way, if one of the parties gives notice to the bank not to pay, unless

upon his endorsement along with that of the other named depositor, the bank, it is thought, are justified in obeying this instruction.

*Lost Deposit Receipt.*—In the form of deposit receipts given above, the docket, “When money is to be drawn, this receipt must be returned, with the signature of the depositor upon the back,” forms a part of the contract between the bank and their customer. Unless, therefore, the deposit receipt is so indorsed and delivered up, the bank cannot be forced to pay, unless on their own terms. When the receipt is lost or mislaid, it is usual for the bank, after the lapse of a reasonable time, to pay the sum contained in it, on a discharge and guarantee by the depositor and an approved cautioner. The following is the form usually adopted in such circumstances:—

To the                      Bank.  
Gentlemen,

I, *A. B.*, residing at                      , considering that I have lost or mislaid a deposit receipt, No.                      , dated the                      , granted for you at your office in                      , in my name, for payment to me of the sum of                      : And whereas you have, notwithstanding the want of said document, made payment to me of the said sum of                      and                      of interest due thereon to the date of delivery hereof: Therefore I, the said *A. B.*, and I, *C. D.*, residing at                      , hereby oblige ourselves and our successors whatever, all conjunctly and severally, to guarantee and defend and relieve you from all and any claim, question, and expense which may be raised against or incurred by you in reference to the said deposit receipt, which we oblige ourselves to deliver to you if and when found.—In witness whereof.

If the depositor is unable to procure a satisfactory cautioner, the bank can stipulate for any reasonable condition being complied with before paying the receipt, although in one case in the Sheriff Court, after proof as to the circumstances attending the loss payment was ordered by the bank (*Newlands*, decided by Sheriff-Substitute Balfour in the Glasgow Sheriff Court on 29 December 1891, and acquiesced in). The point has not, however, been decided by the Supreme Court.

*Negotiation of Receipts.*—A deposit receipt is not in itself a negotiable document capable of being transmitted by endorsement, either in blank or special, and with or without the addition of the words “or order,” so as to confer on the endorsee, by that act, right to the property of the fund represented by it. There is no doubt that the debt or fund is transferable, inasmuch as it is assignable; and an assignation of the debt or fund might be endorsed or written on the back of the document: but such assignation, to be complete, must in ordinary course be intimated to the bank.

See CURRENT DEPOSIT ACCOUNT.

**Deposition by Deceased Persons in Criminal Cases.**—In criminal cases, where there is reason to fear that a person, who would be an admissible witness, if alive at the trial, may die before it, it is competent to take his deposition, which, if he die, may be read at the trial. It may be taken on behalf of the Crown, or of the accused; and whether the deponent be the injured party or not (*Stewart*, 1855, 2 Irv. 166): and even if he be a *particeps criminis* (*Rae*, 1888, 2 White, 62). According to Hume (ii. 407) and Alison (ii. 607), an unsworn declaration, deliberately made, and taken down by “any creditable person,” is admissible, if it be proved to have been freely and voluntarily emitted, under such precautions to ensure its accuracy and fidelity as would naturally suggest themselves. But, in the ordinary case, the examination is conducted by a magistrate, and the deposi-

tion is taken on oath in answer to his questions, or those of the Procurator-Fiscal in his presence. It is reduced to writing, read over to the deponent, and signed by him, if he is able, and by the magistrate, in the same manner as in the case of a prisoner's declaration (see DECLARATION BY PRISONER). If the deponent cannot write, that fact and its cause should be recorded. The writing itself must be produced at the trial, and be sworn to by two witnesses, of whom one should be the examining magistrate, as correct and as emitted voluntarily when the deponent was in his sound and sober senses. It is not necessary that the deceased should believe himself to be dying (*Bell*, 1835, 13 S. 1179; *Brodie*, 1846, Arkl. 45). The precognition of a person deceased is inadmissible (*M'Intosh*, 1838, 2 Swin. 103; *Ormond & Wylie*, 1848, Arkl. 483; BEST EVIDENCE), save where, by being read over to him and sworn to by him as true, it has been made part of a solemn declaration (*Lynch*, 1866, 5 Irv. 300; *Peterson & Dillerca*, 1874, 2 Coup. 557). A distinction has been drawn between the deceased's precognition itself, which is undoubtedly inadmissible (*vide supra*), and the evidence of a witness who heard what the deceased said when precognosed (*Stephens*, 1839, 2 Swin. 348; *Wards*, 1869, 1 Coup. 186; *Lynch*, *ut supra*). As to the weight to be attached to such depositions, see *Brodie*, *supra*.

[See 2 Hume, 406 *et seq.*; 2 Alison, 510 *et seq.*; Dickson, *Evidence*, ss. 1754-1756; Macdonald, 480, 492.]

Deposition of havers, see COMMISSION, PROOF BY; of parties, see OATH ON REFERENCE; WITNESS; of witnesses, see COMMISSION, PROOF BY; NOTES, JUDGE'S; PROOF.

**Deposition of a Clergyman.**—A parish minister found guilty of immoral conduct will be deposed from the office of the holy ministry,—the sentence of deposition prohibiting him from exercising the same under pain of the highest censure of the Church, and depriving him of the whole emoluments of the benefice. If a minister be found guilty of promulgating doctrines at variance with the tenets of the Church of Scotland, he may either be deposed as above, or be suspended from the exercise of his office for a specified time without being actually deprived of the parochial charge he holds. During the period of suspension a substantial share of the emoluments will be assigned to the temporary substitute.

Between 1836 and 1880 the inferior judicatories of the Church, proceeding upon an erroneous interpretation of a decision of the General Assembly in the former year, never deposed a minister in absence. In the latter year the Presbytery of Islay and Jura adopted the view that deposition should at once follow the finding of certain counts of the libel proven, and, after citation of the accused, pronounced sentence of deposition *in absentia*. The minister petitioned the General Assembly to find that sentence of deposition had been illegally pronounced, but, after inquiry, that Court sustained the action of the Presbytery,—the sentence taking effect at the date of its being pronounced, and thus depriving the minister of half a year's stipend, which he would have been entitled to had he been present before sentence was pronounced, and appealed to the Supreme Court of the Church. He afterwards tried to reduce the whole proceedings in the Court of Session, but the action was dismissed.

A deposed minister may be restored to the ministry by or under the authority of the General Assembly; but restoration is seldom granted, except after production of the clearest evidence of the applicant's penitence.

A licentiate not in possession of a charge, if proved guilty of immoral or

of scandalous behaviour, may be deprived of his licence to preach the gospel: but in his case there are no civil consequences.

**Depredation.**—See **HERSHIP**.

**Deprivation of Clergyman.**—See **DEPOSITION OF A CLERGYMAN**.

**Derelict.**—This word is applied to anything forsaken or abandoned. Derelict land left by the recess of the sea belongs to the proprietor of the lands *ex adverso*, whose property is bounded by the sea. See **ALLUVIO**. Moveables, lost or abandoned by their owner, fall generally, by the common law, under the rule *res nullius fit domini regis*. Thus treasures hidden underground, and of unknown ownership, belong to the Crown, or the Crown's grantee. See **TREASURE-TROVE**. "Waif and stray" goods were by the old rule distinguished according as they were animate or inanimate. Stray cattle or other animals, if not claimed within year and day, were regarded as having been relinquished, and as *res nullius* were escheated to the Crown. Inanimate moveables might be reclaimed by the owner at any time within the period of the negative prescription. In the more modern practice, cattle, etc., are impounded, and if unclaimed during a certain period during which advertisement is made, are sold under warrant, to defray the keep and expenses. The Police Acts of most burghs now make provision for the disposal of such property of either kind. The General Burgh Police (Scotland) Act, 1892, (55 & 56 Vict. c. 55), provides for the disposal, by the police authorities, of stray cattle and dogs (ss. 386, 387, 390), and of articles and money found (s. 412). The subject of **WRECKS** will be separately treated.—[See **Stair**, I. vii. 3; **Ersk.** II. i. 12; **Bell**, *Prin.* 1291, 1293–4.] See **LOST PROPERTY**; **WAIFF AND STRAY**; **WRECKS**.

**Dereliction of Valuation of Teinds.**—During the reign of Charles I. various Commissions were from time to time appointed to value teinds throughout the country. The valuation made by such a Commission fixed the value of the teind for all time coming. The principal Commission, or High Commission, as it was called, appointed sub-Commissions for different parts of the country, before which valuations were led. The valuation by the sub-Commission was of no final authority until approved of by the High Commission. But the obtaining of this approval was *res mere facultatis*, and the sub-valuation, at no matter how long an interval, might be presented to the High Commission, and now to the Court of Teinds, for approval. In some cases it has happened that where a sub-valuation of this kind has been obtained, but never ratified, a greater amount of stipend has been localised upon the lands in a final locality than the total value of the teind as contained in the sub-valuation: and this allocation has been acquiesced in by the heritor, to the effect that he has paid the larger amount. In other cases a like over-payment has been made by the heritor to the titular of the teinds of his lands. In either case, where such over-payment has been made (not necessarily for the prescriptive period, *Gray*, 1799, Mor. 15773), in such circumstances as to show an intention



not to stand by the sub-valuation, the sub-valuation is said to be derelinqushed, and it cannot thereafter be approved or made the rule for future payment (*Blairgowrie*, 1797, Mor. 15771; *Airlie*, 1837, 16 S. 92). Dereliction is not inferred from payment to the titular of a less amount than that contained in the decree of valuation (*Drymen*, 1757, Mor. 10675), or by payment in money where the valuation was in grain, the amount of money paid, not being appreciably greater than the value of the grain (*Fergusson*, 1795, Mor. 15768; affd. 1797, 3 Paton, 534; see also *Smollett*, 1885, 12 R. 1150).

A decree of the High Commission cannot be derelinqushed (*Marshall*, 3 July 1816, F. C.); but where the minister had already acquired right to the over-payments by positive prescription before the sub-valuation was approved by the High Commission, the subsequent approbation was held to be "limited and qualified by the said prescriptive right" (*Madderty*, 9 July 1817, F. C.; *Alexander*, 1840, 3 D. 40). But the minister cannot prescribe a right to over-payments made after a decree of approbation of a sub-valuation, or either before or after a new valuation by the High Court of Teinds (*Chisholm Batten*, 1873, 11 M. 292; *Colquhoun*, 1873, 11 M. 919; *Minto*, 1873, 1 R. 156).

In order to infer dereliction it must be clear that the over-payments were made in knowledge of the existence of the sub-valuation, and with an intention of departing from it (*Edmonston* 1807, Mor. App. Teinds, No. 15; *Kinnoull*, 7 June 1826, S. (Teinds) 105; *Richmond*, 1871, 9 M. 1020; *Elbank*, 1888, 15 R. 927). The theory of the law was that the heritor, by not abiding by his valuation, showed that he was sensible that there were grounds of objection to it. Although these grounds have been lost sight of, their existence is presumed from the valuation having been treated as a dead letter. (On this subject generally, see Connell on *Tithes*, 1. 242; Ersk. 2. 10. 34.)

**Descendants.**—The descendants of a person are those who are directly sprung from him, as his children, grandchildren, etc. In the legal order of succession to heritage the descendants take precedence of the other lines; they are followed by the collaterals and the ascendants. The order of preference amongst the descendants is as follows: *first*, the eldest son and his issue; *second*, the next eldest son and his issue, and so on in succession to the other sons and their issue in order of seniority; *third*, failing sons, to daughters, all taking equally as heirs-portioners.—[Ersk. *Inst.* 3. 8; Stair, 3. 4; Bell, *Prin.* ss. 1656 *et seq.*; McLaren on *Wills*, i. 66, 67.] See SUCCESSION.

**Desertion (Conjugal).**—1. *As a Ground of Divorce.*—This term is invariably used to denote "the malicious and obstinate defection" of one spouse, which, if without "reasonable cause" and persisted in for four years, is made a ground of divorce by the Act 1573, c. 55. Under that Act it was necessary for the deserted spouse who desired to obtain a divorce, first to establish the malicious and obstinate character of the desertion in a preliminary action of adherence, and to obtain decree in that action. This necessity, together with other preliminary steps, was removed by sec. 11 of the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86). But this change did not increase the number of "reasonable causes" of non-adherence, and, except during the subsistence of a protection order (see sec. 3 of the Conjugal

Rights Act (*q.v.*), no defence is good which would not have been a sufficient answer to an action of adherence (*Mackenzie*, 1893, 22 R. (H. L.) 32). See ADHERENCE. As to evidence of desertion, see DIVORCE. It is not settled if a deserted wife who has not obtained a divorce can acquire for herself a domicile distinct from that of her husband. See authorities in *Walton, H. & W.* 345; and see DOMICILE.

2. *As a Ground for obtaining a Protection Order.*—By sec. 1 of the Conjugal Rights Act, 1861 (*q.v.*), “a wife deserted by her husband” may apply for an order protecting her property. The Statute provides that the desertion must be “without reasonable cause,” but it does not say that it must be “malicious and obstinate.” It was suggested by *Ld. Deas in Turnbull*, 1864, 2 M. 402, that the same kind of desertion was not required as under the Act 1573, c. 55. But this distinction was doubted by *Ld. Pres. Inglis in Chalmers*, 1868, 6 M. 547.

**Desertion of Diet.**—See DIET; CRIMINAL PROSECUTION.

**Desertion of Infants.**—See EXPOSING CHILDREN; ABANDONING CHILD.

### **Desertion (Military, Naval, Mercantile Marine).**

—The offence in military law of deserting or attempting to desert Her Majesty's service implies an intention either to escape some particular important service, or not to return to Her Majesty's service, without being discharged or without leave of absence; and intention is of the essence of the offence. Mere length of absence, or the fact that the offender has gone away a long distance, does not necessarily imply intention to desert, but the fact that a man has disguised himself, or conceals himself when called upon for any important duty, such as foreign service, is strong evidence of intention (*Manual of Military Law*, p. 23). “Every person subject to military law who commits any of the following offences: that is to say, (*a*) deserts or attempts to desert Her Majesty's service; or (*b*) persuades or endeavours to persuade, procures or attempts to procure, any person subject to military law to desert from Her Majesty's service, shall, on conviction by court-martial—if he committed such offence when on active service, or under orders for active service, be liable to suffer death, or such less punishment as in this Act mentioned; and if he committed such offence under any other circumstances, be liable for the first offence to suffer imprisonment, or such less punishment as in this Act mentioned; and for the second or any subsequent offence, to suffer penal servitude, or such less punishment as in this Act mentioned.” A previous offence of fraudulent enlistment may be reckoned as a previous offence for the purpose of higher punishment (*Army Act*, 1881 (44 & 45 Vict. c. 59), s. 12). Desertion from the navy is punished in a similar manner (24 & 25 Vict. c. 115, ss. 19–21). An offender is liable, on conviction or confession of desertion, to general service, or transfer to such corps of the regular forces as the competent military authority may from time to time order (s. 83 (7)); but this does not apply to the Royal Marines (s. 179 (12)). A deserter, upon conviction by court-martial or confession, also forfeits the whole of his prior service (s. 73 (1) (3), s. 79 (2)), and his pay while absent on desertion or undergoing imprisonment (s. 138 (1)); but the forfeited service may be restored (s. 79), and the

deduction of pay remitted (s. 139) by a Secretary of State. Regulations with regard to the disposal of the effects of a deserter are contained in the Regimental Debts Act, 1893 (56 & 57 Vict. c. 5), s. 23, and the rules made in pursuance of that Act by Royal Warrant of 30 August, 1893, s. 36-48. A soldier on furlough, if detained by sickness or other casualty, may, if there is no officer at hand for the performance of military duty of the rank of captain, get an extension not exceeding one month from a justice of the peace, who must certify the extension and the cause thereof to the soldier's commanding officer or a Secretary of State, and such an extension will prevent him from being treated as a deserter or absent without leave (s. 173). Sec. 27 (3) provides that every person subject to military law who, "being a soldier, falsely states to his commanding officer that he has been guilty of desertion or of fraudulent enlistment, or of desertion from the navy, or has served in and been discharged from any portion of the regular forces, reserve forces, or auxiliary forces, or the navy, shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned." Deserters found in the enemy's ranks are traitors, liable to the penalty of death. They are not entitled to the privileges of prisoners of war, and cannot, without special mention, claim the benefit of any general agreement made in regard to prisoners of war (*Manual of Military Law*, p. 309; Vattel, ii. 173; Heffter, 245; Halleck, ii. 93). A soldier is not to be tried for desertion, except desertion on active service, if, after the offence has been committed, he has served continuously in an exemplary manner in a corps of the regular forces for not less than three years (s. 161).

A prisoner charged before a court-martial with desertion may be found guilty of attempting to desert or of being absent without leave, and a prisoner similarly charged with attempting to desert may be found guilty of desertion or of being absent without leave (s. 56 (3) (4)). Every person subject to military law who assists any person subject to military law to desert, or, being cognisant of any desertion or intended desertion of a person subject to military law, does not forthwith give notice to his commanding officer, or take any steps in his power to cause the deserter, or intending deserter, to be apprehended, is liable to imprisonment, or such less punishment as is mentioned in the Act (s. 14).

Civil penalties for offences with regard to desertion are provided in (ss. 152, 153, 154, 163 (1) (6)). Any person who pretends to be a deserter is liable on summary conviction to be imprisoned, with or without hard labour, for a period not exceeding three months (s. 152). Any person who induces, or attempts to induce, a soldier to desert, aids him to desert, or conceals him knowing him to be a deserter, is liable on summary conviction to be imprisoned, with or without hard labour, for a period not exceeding six months (s. 153). Sec. 154 provides for the apprehension of suspected deserters, which may be effected by any constable, or, if none can be met with, by "any officer, soldier, or other person"; or a justice of the peace, magistrate, or other person having power to issue a warrant, may, if satisfied by evidence on oath that a deserter is, or is reasonably suspected to be, within his jurisdiction, issue a warrant for his apprehension. The suspected person must forthwith be brought before a Court of summary jurisdiction, and the Court, if satisfied by evidence on oath or by confession that such person is a deserter, shall cause him either to be delivered to military custody, or to be committed to prison for a reasonable time, until he can be so delivered. The Court shall in either case transmit to a Secretary of State (Secretary for War or Secretary of the Admiralty) a descriptive return in

relation to such deserter in accordance with the form given in Sched. 4, for which the clerk shall be entitled to a fee of two shillings. The return also states the person to whom the reward for apprehension is due, and the amount—five shillings, ten shillings, fifteen shillings, or twenty shillings—which the Court think should be granted. Desertion is not an offence at common law in Scotland, but to seduce a soldier or sailor to desert is (Hume, i. 528, 260, ii. 34, 41; Macdonald, 237).

[See *Manual of Military Law* (War Office, 1894); Pratt, *Military Law*.]

See ARMY; COURT-MARTIAL; ENLISTMENT; RESERVE FORCES; MILITIA; VOLUNTEERS; YEOMANRY.

In the merchant service, if a seaman lawfully engaged, or an apprentice to the sea service, deserts from his ship, "he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned, and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding twelve weeks with or without hard labour" (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 221). Sec. 222 provides for the conveyance of a deserter on board his ship: sec. 223 for the arrest and imprisonment of a deserter outside the United Kingdom, and sec. 224 gives power to the Court to order a deserter to be taken on board ship. But a seaman leaving his ship to enter the naval service of Her Majesty is not a deserter; and any stipulation in any agreement "whereby a seaman is declared to incur a forfeiture or be exposed to a loss in case he enters the naval service of Her Majesty shall be void: and if a master or owner causes any such stipulation to be so introduced, he shall for each offence be liable to a fine not exceeding twenty pounds" (s. 195).

[Scrutton, *Merchant Shipping Act*, 1894; Temperley, *idem*; Pulling, *idem*.]

**Desertion of Service.**—It is the duty of a servant under the contract for the hire of his labour to continue in his master's service for the time stipulated. If he deserts it without sufficient grounds, the master's remedies at common law are to refuse to readmit him to his service, to retain his wages, and, where the desertion causes actual injury to the master himself or to his business, to claim damages for breach of contract (Ersk. iii. iii. 16). No judicial authority is required for dismissal without wages. The amount of wages which the deserting servant forfeits includes only the sum accruing during the broken period since the last date of periodical payment, and not the whole sum due under the contract. The amount which the master may obtain as damages is a question for a jury, in determining which the amount of the wages forfeited is to be taken into consideration.

Whether the servant's absence amounts to desertion is a question of circumstances, such as the cause, and especially the duration, of the absence, and its effects upon the master's interests, etc. Absence for one or two days, though without excuse, is not sufficient, except in very special cases, as, *e.g.*, in theatrical engagements, where it has been held that a very short absence is enough. The servant's enlistment in the army does not save him from liability in damages for breach of contract (44 & 45 Vict. c. 58,

ss. 96 and 144); nor does the marriage of a female servant. Even an involuntary absence may amount to a breach of contract if it arises from the servant's fault.

It was formerly held that—in cases of service other than those of domestic servants, and of professional men or superior workmen such as clerks and overseers—the master might at common law demand specific fulfilment, alternatively to claiming damages for breach of contract. In the leading case (*Rachburn*, 1824, 3 S. 104), it was held “on principles of expediency” to be competent for the Sheriff to grant warrant to imprison a servant who had deserted, if he should fail to find caution to return to his employment. This decision, although its soundness was frequently doubted, was followed in several cases (*Cameron*, 1866, 4 M. 547). The common law was supplemented by several Statutes, particularly the Act 4 Geo. IV. c. 34, now repealed. It is submitted, however, that this remedy has now been abolished, though not in express terms, by the provisions of the Employers and Workmen Act, 1875, referred to below, and that only the civil remedy of an action of damages is left. The question has been so decided in the Sheriff Court (*Coghill*, 1877, Guthrie, *Sheriff Court Cases*, 373). Reference must be made, for a fuller discussion on the point, to Fraser (*Master and Servant*, pp. 101, 382).

It is, however, to be noticed that in certain cases desertion of service is by Statute made a criminal offence. The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), provides that where any person employed by those who have charge of gas or water works wilfully and maliciously breaks his contract of service, when he knows or has reason to believe that his doing so will probably deprive the inhabitants of a place of their supply of gas or water, the offender shall be liable to a fine not exceeding £20, or to imprisonment, with or without hard labour, for a period not exceeding three months (s. 4). The same penalty is imposed on any person who wilfully or maliciously breaks a contract when he knows or has reason to believe that the probable result will be to endanger human life, or cause serious bodily harm, or expose valuable property to destruction or serious injury (s. 5).

Apart from these special cases, the master's remedies against a deserting servant now mainly rest upon the Employers and Workmen Act, 1875, (38 & 39 Vict. c. 90). This Statute replaces several earlier enactments dealing with the relations of master and servant which were repealed by the Conspiracy and Protection of Property Act of the same year. It gives the Sheriff, both in the ordinary Sheriff Court and in the Small Debt Court, extensive powers of arbitration in disputes between masters and servants, “so far as the dispute arises out of the parties' relations as such.” Amongst these powers the Court is authorised to adjust and compensate all claims and counter-claims, whether liquid or not, to rescind the contract, at the same time apportioning wages, or awarding damages, if it sees fit: and in place of the whole or part of the damages which it would otherwise award, it may, if the parties agree, accept security for implement of the contract, and, in the event of non-performance, may order payment of the sum becoming due in pursuance of such security (s. 3). It gives no power to enforce specific implement by imprisonment, except in the case of apprentices. The procedure is detailed in the Act (ss. 8 and 9). This Act does not apply to domestic or menial servants, but to any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into a contract with an employer (s. 10). Seamen and apprentices to the sea service were expressly

excluded from the Act, but they have by a later enactment been brought under its provisions (43 & 44 Vict. c. 16, s. 11).

The Act applies also to apprentices belonging to the same classes. In their case, in addition to the powers given in dealing with workmen, the Court is authorised to order the apprentice to perform his duties, under sanction of imprisonment for a period not exceeding fourteen days (s. 6). It may rescind the contract and order repayment of the premium; and it may order any person who is liable, under the instrument of apprenticeship, for the apprentice's good conduct, to pay damages for his breach of contract. See MASTER AND SERVANT: APPRENTICE. Fraser, *Master and Servant*, 3rd ed., pp. 101 f., 372 f.

To entice or "seduce" a servant or apprentice to desert the master's service renders the person doing so liable in damages. A mere attempt to entice the servant away is not enough, and it is necessary to show that the defender knew the person enticed to be the pursuer's servant (Fraser, pp. 308, 350).

**Desertion by a Tenant.**—As regards leases of agricultural (including pastoral) subjects, it was provided by the 5th section of the Act of Sederunt, anent Removings [14 December 1756], that if a tenant deserted his possession of the subjects let, and left them unlaboured, the lessor might bring an action of removing against him before the Sheriff, who might "decern and ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is of shorter duration than five years, within a certain time to be limited by the judge, and, failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined, and the tenant had been legally warned in terms of the foresaid Act, 1555." This remedy, where a tenant deserts his farm, does not exist under leases granted subsequent to 11 Nov. 1881, under which there is no right of hypothec (46 & 47 Vict. c. 62, s. 27, repealing 43 Vict. c. 12, ss. 2, 3). See under AGRICULTURAL HOLDINGS ACT: HYPOTHEC; LEASE; REMOVING.

In regard to urban tenements and cases where a landlord's right of hypothec exists, the summary remedies open to a lessor, where the lessee deserts possession or dispossesses the premises, are discussed under HYPOTHEC and PLEISHING ORDER: see also Rankine, *Leases*, 2nd ed., 360, 368.

As to what amounts to desertion, it has been decided, *inter alia*, that mere defect in stocking (*Abercromby*, 1816, Hume, 587), or temporary absence (*Jamieson*, 1828, 6 S. 788), is not sufficient. See also *Brown*, 1758, in Ross on *Removing*, 104; *Honeyman*, 1806, Hume, 824 (absence of one of two joint tenants). On the other hand, caution has to be found where the tenant withdraws from the jurisdiction of the Court, and the land is to a material extent unlaboured (*Araol*, 1805, Hume, 576; *Cossar*, 1847, 9 D. 617; Rankine, *Leases*, 2nd ed., 481-5. For the form of application, see Lees, *Sheriff Court Styles*, 3rd ed., 344).

**Designation.**—This is the term applied to the appropriation or setting apart of a piece of land in a parish as a glebe, or as a site for the manse for the minister, or as a site for the church, or as a churchyard. The rules which govern this appropriation, and the procedure by which it is effected, will be found explained in the articles dealing with these respective

subjects. The burden of making such a provision is one common to the heritors of the parish, and accordingly the heritor whose lands happen to be selected as the most eligible for the purpose contemplated has a right of relief against his brethren. But where the lands designed are Church lands (and Church lands are always taken first for a glebe), the heritor has relief only against the owners of Church lands, not against owners of temporal lands (*Mags. of Montrose*, 1832, 10 S. 211). See MANSE; GLEBE; BURYING-PLACE; KIRK.

**Designs.**—For the earlier history of the subject, reference is made to Edmunds on *Designs*, 1896. At present the law is governed by the Patents, Designs, and Trade Marks Acts, 1883–88. The leading Act, 46 & 47 Vict. c. 57, defines a “design” as “any design applicable to any article of manufacture, or to any substance, artificial or natural or partly artificial and partly natural, whether the design be applicable for the pattern or for the shape or configuration or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act of the year 1814 (fifty-fourth George the Third, chapter fifty-six).” This does not make any attempt to define the word “design” in any way apart from its ordinary meaning; but it limits the use of it to three cases: (1) pattern, (2) shape or configuration, and (3) ornament, or any combination of these. The design need not have artistic merit; constructive merit is sufficient (Board of Trade Official Reports of Patents, Designs, and Trade Marks Cases,—designs cases first appearing in vol. iv.,—here cited as R.P.C.; *Falkirk Co.*, R.P.C., iv. 391: 14 R. 1072); but it must be something appealing to the eye, and to the eye alone, apart from the object to which it is to be applied (*Moody*, R.P.C., ix. 392, 1892). It must not be a process or mode of manufacture, *e.g.* a pattern of osier basket consisting in the osiers being worked in a particular way (*Moody, supra*), or a particular combination of certain movements of a lace-making machine (*Plackett's Design*, R.P.C., ix. 438). It may be for something which might have been patented, and it may be applicable only to part of the complete article (*Walker*, 14 R. 1072; R.P.C., iv. 390).

Any person claiming to be the proprietor of any new or original design, not previously published in the United Kingdom, may (s. 47 of the Act of 1883) apply to the Comptroller-General of Patents, Designs, and Trade Marks to have the design registered in the Register of Designs kept at the Patent Office. The applicant must state the nature of the design and the class or classes of goods in which he desires that it may be registered, and whether it is to be registered for pattern, for shape or configuration, or for ornament; and the same design may be registered in more than one class. He must also lodge the proper number of copies of the design, and comply with various formalities in terms of the rules (Designs Rules, 1890, and Designs Rules (Lace), 1893: Sales Branch, Patent Office, 25 Southampton Buildings, London, W.C.). The Comptroller may refuse to register, subject to appeal to the Board of Trade, which shall, if required, hear the applicant and the Comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted; and if the design is registered, the Comptroller grants a certificate of registration

to the proprietor of the design (s. 49), which certificate is accompanied by a perspective or diagrammatic drawing of the design, as the case may require. It is essential, therefore, that the design should be new or original ("new and original" in the old Act, 5 & 6 Vict. c. 100), showing some real substantial difference from what has gone before (*Smith*, R.P.C., vi. 205, 1889); and it must be either substantially novel or substantially original, having regard to the subject-matter, *i.e.* the purpose to which it is to be applied (*Bach's Design*, R.P.C., vi. 376, 1889). Difficulties sometimes arise on this score, which may be illustrated by examples. Variations in the form or stitching of a necktie have been found to be insufficient to support novelty or originality (*Smith, supra*); it has been held that a corset which looked the same as an old corset, but was structurally different, was not different therefrom in appearance or shape, and therefore not in "design" (*Cooper*, R.P.C., x. 264, 1893); that substituting a flange for slip-fittings at the base of a lamp-stove globe, though it makes the globe more useful, is not sufficient (*Sherwood*, R.P.C., ix. 268); and in lace patterns it appears to be difficult to ensure sufficient novelty (*Plackett*, R.P.C., ix. 436: see also *Clarke*, R.P.C., xiii. 351). On the other hand, a writing-table has been held to form as a whole a novel design, though no part of the table was novel in itself (*Heinrichs*, R.P.C., x. 160); the adoption, for kitchen-range fire-doors, of mouldings already in use for doors of various articles of furniture has been held novel (*Walker*, 14 R. 1072: R.P.C., iv. 392); a combination of a bassinette and mail-cart has been held good subject-matter (*Rivett*, R.P.C., xi. 351); and a combination of an old black-and-white design with a woven pattern has been held to be new and original (*Knoules*, R.P.C., xii. 147). In some cases the circumstance that the design has been imitated has been held as tending to show that it was original (*Heinrichs, supra*, and *Harper*, R.P.C., xii. 492); and so also has it been that the new design has at once commanded a large sale (*Tyler*, R.P.C., xi. 35), though this, as well as the utility of the article (*Moody*, R.P.C., ix. 334), stands, in itself, apart from the requisite novelty or originality. If a similar design have been already registered in another class of goods, it cannot be again registered in another class unless the articles are entirely different, and mere change of material (*e.g.* a porcelain lamp-shade instead of a paper one of the same shape) does not constitute novelty of design (*Bach*, R.P.C., vi. 376: compare *Read*, R.P.C., vi. 471).

The novelty of a design may be vitiated by prior or premature publication. As to the former, see *Chard*, R.P.C., ix. 423, and *Plackett's Design*, R.P.C., ix. 436. As to premature publication, the question generally is one of confidentiality (see *Blank*, R.P.C., v. 653; *Winfield*, R.P.C., viii. 15; *Heinrichs*, R.P.C., x. 160). The Act of 1883 makes provision (s. 57) for the protection of designs exhibited at industrial and international exhibitions.

It is not novelty in the idea of the design itself which is required, but in the application of the design to some article of manufacture; thus a picture of Westminster Abbey, taken from a particular point of view, is a good design as applied to a spoon (*Saunders*, R.P.C., ix. 467, and x. 29); but it remains open to any other person to apply to a spoon a picture of the same Westminster Abbey, taken from any other point of view, for this constitutes a different design (*Saunders*, R.P.C., ix. 469). The design must be registered or rejected as a whole, and it cannot be partially rejected or deleted from the register (*Smout*, R.P.C., vii. 90).

When the design has been registered, the registered proprietor of the design has (s. 50 of the Act of 1883) *copyright* in the design—that is, he has



(s. 60) the exclusive right to apply the design to any article of manufacture or to any substance (artificial or natural, or partly artificial and partly natural) in the class or classes in which the design is registered—during five years from the date of registration. This copyright has no extra-territorial application, so that it is open to anyone, even though he lives in the United Kingdom or the Isle of Man, so long as he makes and sells wholly abroad, to imitate and apply the copyright design in foreign countries (*Potter*, 18 R. 511; R.P.C., viii. 218). But within the United Kingdom and the Isle of Man, during the existence of the copyright in any design, it is not lawful for any person (s. 58 (a)), without the licence or written consent of the registered proprietor, to apply such design, or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale, to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural; nor (s. 58 (b)) to publish or expose for sale any article of manufacture, or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor. It would appear that any licence to apply a design ought to be in writing (*Woolley*, R.P.C., ix. 212). Whether any alleged infringement is really such, is a question of fact, and the real test to be relied on is the eye (*Hothersall*, R.P.C., ix. 40). Where a design is registered for shape, the object of the design, or the circumstance that a similar object is attained by any alleged infringing article, is immaterial, and the design must be judged by the eye, taking into account the state of knowledge at the time, and in what respects the registered design was new and original, when considering whether variations from the registered design were material or not (*Hecla Foundry Co.*, 16 R. (H. L.) 27; R.P.C., vi. 554). The design, as applied by the alleged infringer, must be the same as, or a fraudulent or obvious imitation of, the registered design; and differences in detail do not necessarily prevent a design from being an obvious imitation of another (*Harper*, R.P.C., xii. 489; *Hecla Foundry Co.*, *supra*; *Knowles*, R.P.C., xii. 137; *Oliver*, R.P.C., xiii. 490). Where a designer is given a registered design, and told to make an original design for a similar article, it has been held that this was equivalent to a clear direction to him to make an obvious imitation (*Harper*, R.P.C., xii. 489, 493).

Again, the differences may be such as to prevent the design from being an obvious, while yet it remains a fraudulent, imitation (*Sherwood*, R.P.C., iv. 207, 210); and they may be so great as to prevent there being such similarity as will amount to infringement (*Demartial*, R.P.C., ix. 499; *Walker*, R.P.C., ix. 482; *Birkin*, R.P.C., xii. 371); and if this be so, a design may be good even though it be founded on a previous design (*Harper*, R.P.C., xii. 491).

The proprietor of a design registered in one class has no action against anyone who applies his design outside that class (*Read & Gresswell's Design*, R.P.C., iv. 471); and as any person who infringes by publishing, or exposes for sale, must be shown to have known that the consent of the registered proprietor had not been given, the innocent retail dealer is protected (*Smith*, R.P.C., v. 611; *Jan*, R.P.C., xii. 537). The registered proprietor has at common law a right to interdict, and by statute he has an alternative right of suing for penalties (s. 58), not exceeding £50 for each offence, as a simple contract debt (but see *Saunders*, R.P.C., ix. 470, and *Sherwood*, R.P.C., iv. 212, as to the amount of penalty given; and 51 & 52 Viet. c. 50, s. 7, which limits the total penalty to £100), or for damages (s. 59). It is only regis-

tered proprietors of designs who have (under the Patents, etc., Acts) any right of action for infringement; exclusive licensees have none (*Woolley*, R.P.C., ix. 208). The author of a new or original design is the proprietor thereof, unless he has executed the work on behalf of another for a good and valuable consideration (s. 61); in that case such other person is the proprietor. The onus of proof is on the person who claims to be proprietor or author of a design, and when he fails to discharge this onus, his case is held to fail (*Hothersall*, R.P.C., ix. 38; *Heinrich's Design*, R.P.C., ix. 73). The copyright in a design is moveable property, and may be assigned or transmitted as such; and it may be divided among various proprietors, each of whom is a proprietor to the extent of his interest (see sec. 61).

The copyright in registered designs may cease in various ways. (1) Lapse of time (five years). (2) Erasure from the register, in consequence of failure to supply the Comptroller with the prescribed copies of the design, prior to any delivery on sale of any articles to which the registered design has been applied (s. 50 (2)). (3) Failure to mark every article to which the design is applied with the prescribed mark (Reg<sup>d</sup> or R<sup>d</sup>, with a number (see the Designs Rules)), which denotes that the design is registered, such marking being prior to any delivery on sale of such articles: unless the proprietor shows that he took all proper steps to ensure the marking of the article (s. 51). If there be delivery on sale before such marking is put on each article, the registration is bad (*Blank*, R.P.C., v. 659; *Woolley*, R.P.C., ix. 429; *Hothersall*, R.P.C., ix. 29); and the owner must direct that every article be examined before it is put on the market (*Johnson*, before Lord Low, 1894, R.P.C., xi. 21, in which case the marking-stamp had become worn, and the marking was illegible). No harm is done by the owner putting wrong registered numbers on the articles he sells, if these numbers are in addition to, and not instead of, the right ones (*Harper*, R.P.C., xii. 491). (4) By a registered design being used in manufacture in a foreign country, and not being used in this country within six months of the registration in this country (Act 1883, s. 54).

By a provision (Act 1883, ss. 52 and 53) to which considerable exception has been taken, the design as recorded on the register is, so long as the copyright lasts, not open to inspection except by the proprietor, or by a person authorised by the proprietor, the Comptroller, or the Court, or (51 & 52 Vict. c. 50, s. 6) by an applicant for registration of a design when his application has been refused by the Comptroller on the ground of identity with the already registered design: and in all these cases only in the presence of the Comptroller or of an officer of the Patent Office; and no copy of the design or of any part thereof, can in any case be made. If a person satisfies the Comptroller that he is acquainted with the registered design or its mark of registration, the Comptroller is authorised to inform him as to whether the registration of that design exists, who is the owner, his address, and the date of registration. As to the question whether registration is, under these circumstances, equivalent to publication of a design, see *Read & Gresswell's Design*, R.P.C., vi. 474.

The register is *prima facie* evidence of all matters entered in it, such as names and addresses of proprietors, assignments, transmissions, etc. The person (or persons) registered as proprietor is held to be the proprietor, and to have the right to deal with the design, or his interest in the design, subject to all equities and to all vested rights appearing on the register (s. 87). No trust, implied or constructive, can be entered on the register. The Court can order rectification of the register at the instance of any person aggrieved. In the event of a company changing its name, the

Comptroller can rectify the register by order of the Court (*Pneumatic Tyre Co.'s Design*, R.P.C., xi. 636), or apparently without such an order under ss. 87 and 55 of the Act of 1883 (compare *New Ormonde Co.'s Trade Mark*, R.P.C., xiii. 475). Certified copies of entries in the register, relating to the design, can be obtained, bearing the seal of the Patent Office; this seal makes them evidence in all Her Majesty's Courts as to the registration (1883, ss. 89, 84).

Any person who marks any article sold by him with the word "registered," or any word or words expressing or implying that registration has been obtained for the article, when it is not so, is liable to a fine not exceeding five pounds for every offence (s. 105), on prosecution in the Sheriff Court (s. 108).

By sec. 111, the provisions of the Act conferring a special jurisdiction on the High Court of Justice in England do not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland in any proceedings relating to designs; and with reference to any such proceedings in Scotland, the term "Court" as used in the Act means any Lord Ordinary, and the term "Court of Appeal" means either Division of the Court of Session. If any rectification of a register under the Patents, etc., Acts is required in pursuance of any proceeding in a Court in Scotland, a copy of the order, decree, or other authority for the rectification, shall be served on the Comptroller, and he shall rectify the register accordingly.

In Scotland, the practice has been to try cases of infringement of designs simply on a Note of Suspension and Interdict, the prayer of which may run somewhat in the following form:—"To interdict, prohibit, and discharge the respondent by himself, or others acting for him, from infringing the copyright of the complainer in the registered designs Nos. , , and , the property of the complainer, duly registered in the Register of Designs in terms of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, in respect of the application of such designs to articles of manufacture [*or, to substances*] comprised in class [*number of class*] in the classification of goods under the Designs Rules, 1890, made in pursuance of the said Patents, Designs, and Trade Marks Acts: and to interdict, prohibit, and discharge the respondent, by himself or others acting for him, without the licence or written consent of the complainer, from applying or causing to be applied the said registered designs or any of them, or any fraudulent or obvious imitation of them or any of them, to any article of manufacture [*or, to any substance*] in the foresaid class [*number of class*] in which the said designs are registered for purposes of sale, and from selling, publishing, or exposing for sale, or causing to be sold, published, or exposed for sale, any article of manufacture [*or, any substance*] in the foresaid class [*number of class*] to which such designs or any one or more of them, or any fraudulent or obvious imitation thereof, shall have been applied other than articles [*or, than substances*] manufactured by the complainer, and that during the subsistence of the complainer's copyright in the said designs; and from in any way infringing or injuring the sole and exclusive right of the complainer to the said designs, or any of them." In the *Walker Fire-Door* cases (14, 15, 16 R.) the form was: "from infringing the copyright of a registered design for kitchen range fire-doors, No. 16596, the property of the complainers, conform to certificate of registration dated 10 Nov. 1884, granted in pursuance of the Patents, Designs, and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, and in particular from making, vending, or using any fire-doors for kitchen ranges having a moulding cast or fixed thereon in manner shown in the design, a copy of which is annexed

to the said certificate of registration, or in manner substantially the same, and from infringing the copyright of the said registered design in any other manner of way." The pleas in law for the complainer are usually in common form, *e.g.*: "The respondent having infringed the complainer's copyright as above condescended on and having refused to discontinue said infringement, the complainer is entitled to have the interdict craved, with expenses." The pleas in law for the respondent are partly in common form, *e.g.*: "The respondent not having infringed any rights of the complainer, the note ought to be refused, with expenses"; and partly appropriate to the nature of the right in dispute, or to the circumstances of the case, as in the following examples:—(1) "The complainer's alleged design not being new or original, the note, etc." (2) "The complainer's alleged design not being a design or a proper subject of registration and certificate within the meaning of the Patents, etc., Acts, 1883–1888, the note etc." (3) "The complainer not being the author of the said alleged design, nor having acquired the same, nor the right to use the same, by a valid or exclusive legal title, is not proprietor thereof within the meaning of the Patents, etc., Acts, 1883–1888." (4) "The complainer having failed, before delivery on sale of articles to which his said registered design has been applied, to cause each such article to be marked in terms of the Statutes and relative rules, his copyright, if he any had, has ceased." (5) "The complainer having failed to comply with the requirements of the Patents, etc., Acts, 1883–1888, has no copyright in (either of) the design(s) in question." (6) "The complainer having no copyright in the said alleged design, the note, etc." (7) "The complainer's averments are irrelevant and insufficient to support the prayer of the note." (This plea, as well as the next, was sustained by the Inner House in *Potter*, 18 R. 511, where the complainers failed to aver that the goods complained of were manufactured in this country, while the respondents averred they were not.) (8) "In respect that the said designs are printed and applied to the goods only in Portugal, and the goods themselves are sold only in Portugal, the respondents are entitled to absolvitor." (9) "The note ought to be dismissed in view of the respondent's undertaking not to print nor in any way utilise the designs complained of." The right to sue for damages or for penalties under the Statutes is usually reserved in the Note of Suspension and Interdict; but it does not appear to have been necessary in any of the cases to raise actions for these, once the main question has been settled, as between the parties, under the proceedings for suspension and interdict. In English practice the plaintiff usually claims injunction, penalties or damages or an account of damages, delivery up of the infringing articles, and costs, all in the one statement of claim.

In *Walker*, 15 R. 660, R.P.C., v. 72, 365, it was ruled that anticipation cannot be relied upon unless it is pleaded on the record; and that while it is open to a subsequent respondent to raise the same objections to a design as had been urged by a prior infringer, the Outer House would, in regard to these objections, follow the previous decision of the Inner House, so far as applicable.

**Destination.**—See VESTING; DISPOSITION.

**Desuetude.**—The law of Scotland has allowed Acts of Parliament and Acts of Sederunt to lose their force by disuse, without express repeal,

or to go into desuetude, as it is termed. It appears that still (1) all Acts of Sederunt, (2) Acts of Parliament before the Union, may fall into desuetude (see Report of Lords of Session, 27 February 1810; Printed Acts of Sederunt, 1791–1824, p. 53; Stair, i. 1. 16, More's ed., 1832, p. 12; Ersk. *Inst.* i. 1. 45). Mere non-usage or neglect of a Statute, even though "for the greatest length of time," is not sufficient to throw the Act into desuetude: there must also be some positive custom or action to the contrary which clearly shows the intention of the community to repeal the Act (Ersk. *Inst.* i. 1. 45; *Bute*, 1870, 1 Comp. 495). It does not appear to be necessary that the disuse should have extended over any definite period of time,—though in one case (*Gardiner*, 1828, 4 S. 352, and 6 S. 693) desuetude is supported by a proof of disuse for forty years,—a general disuse of "long duration" and a clear custom to the contrary is sufficient.

There are two points in connection with desuetude on which there is some difference of opinion amongst the authorities. First, as to what Statutes are liable to fall into desuetude. Erskine (i. 1. 46) says: "this power in custom to derogate from prior Statutes has been confined by most writers to those concerning private right." Bankton (i. 1. 60) expresses the same opinion, quoting *Jack*, 1681, Mor. 1838, in which the principle is laid down that an act of public policy cannot fall into desuetude. Erskine, however, in the passage above quoted, goes on to say that public Statutes concerning the elections of magistrates in burghs may fall into desuetude: but there seems to be no doubt, from the decisions, that this is also the case as regards all other public Statutes (see *Smolet*, Mor. 1895; *Anderson v. Mags. of Wick*, 1749, Mor. 1842; *Paterson*, 6 Dec. 1810, F. C.; *Trotter*, 8 July 1809, F. C.; *Grant*, 1849, 12 D. 201; *Johnstone v. Stott*, 1802, 4 Pat. 274).

Second, as to the power of the King in Council to re-enact Statutes which have fallen into desuetude. Mackenzie (Bk. i. 1. 10) states that the King in Council could by proclamation re-enact such Statutes without the help of the Legislature. Erskine (*Inst.* i. 1. 45) limits the right to that of prohibiting by proclamation a contrary usage where such usage has not gained sufficient strength to bring about abrogation.

There is no parallel to desuetude in English law (see remarks per Ld. Chan. Eldon in *Johnstone v. Stott* above cited, at p. 283. See also Dwaris, p. 530).

**Deviation.**—Under the contract of affreightment, the shipowner is under an implied obligation that the voyage contracted for shall be performed according to the rules of good seamanship. Part of this duty is that there shall be no "deviation," *i.e.* no voluntary or unexcused departure from the regular course of the voyage. The custom of sailing prescribes a certain course of navigation between the *termini* mentioned, and this, as a matter of general mercantile knowledge, is presumed to have been in the contemplation of the parties in entering into the contract. Where the voyage is not a known and usual one, the proper course is the safest and most expeditions.

Deviation from the course as thus determined renders the shipowner liable in damages to the charterer, or to the holder of a bill of lading. In the absence of express provisions to the contrary, this liability clearly extends to any loss, even from an excepted peril, arising directly or indirectly from the deviation, or occurring *during* the deviation. The merchant is not required to show that the deviation occasioned the loss.

As regards loss occurring after deviation, it is still doubtful whether the shipowner can escape by showing that it not only might, but *must*, have occurred in any case (*Davis*, 1830, 6 Bing. 716, per Tindal, C. J., at 724; *Donaldson Bros.*, 1883, 10 R. 413; *Balian*, 1890, 6 T. L. R. 345). See CHARTER-PARTY.

In the contract of marine insurance, the risk is calculated on the regular course of the voyage, and accordingly in every voyage policy there is, on the part of the insurer, an implied warranty of "non-deviation." Any breach of this warranty, however short, immediately liberates the underwriters from liability for loss under the policy. It is not necessary for them to prove that any loss which may have occurred was attributable to the breach of warranty, or even that the risk was increased by it. It has long been settled that all that is needed to avoid the policy and free the insurer is a change, though without an aggravation, of the risk. Nor does the liability revive although the ship, after deviation, returns in safety to the regular course (*Elliot*, 1776, 2 Pat. App. 411; *Hamilton v. Sheldon*, 1837, 3 M. & W. 49). This warranty is not, however, like that of seaworthiness, a condition precedent to the policy attaching, but a promissory warranty relating to the conduct of the voyage; and hence the underwriters remain liable for losses occurring prior to the breach of it.

Mere intention, or instructions, to depart from the prescribed course are not enough. There must have been actual deviation (*Hare*, 1822, 7 B. & C. 14; *Thellusson*, 1 Doug. 360). In this respect deviation is to be distinguished from abandonment or alteration of the voyage. The test is whether or not the final destination specified in the policy is given up. Abandonment implies a change in the destination—the substitution of a new voyage for that originally contemplated. Deviation is only a departure, during the voyage, from the usual and proper course, but without giving up the hope or intention of ultimately reaching the original *terminus ad quem*. Both discharge the insurer's liability: but while deviation does so only from the point of actual divergence, abandonment operates from the time at which the intention to abandon is definitively formed (*Tusker*, 1819, 1 Bligh. 87). Where this intention is formed only after sailing, the policy will not cover a loss which occurs on the course common to both the original and the substituted voyages (*Wooldridge*, 1778, 1 Doug. 16). Where, on the other hand, it occurs before sailing, it is held that the voyage has never been entered upon. The risk has not been run, and the policy never attaches at all. And under a policy "at and from," the insurers are not liable even for loss occurring *at* the port where the risk was to begin.

Deviation, besides actual departure from the prescribed course, includes any failure in the shipowner's obligation to begin and complete the voyage with reasonable speed, *i.e.* any undue delay, amounting to wilful waste of time, either at the port of departure or in the course of the voyage (*Mouat*, 1831, 8 Bing. 108. See per Tindal, C. J., at p. 122, for the *ratio* of this rule. *Fraser*, 1872, L. R. 7 Q. B. 566, per Ld. Blackburn at p. 570). Time required in preparation for the voyage, or for some purpose rightly connected with it, is not deviation. But even where the purpose of the detention is justifiable, detention is deviation if it exceeds a reasonable time. What is a reasonable time is a question of circumstances, depending mainly on the state of matters at the port where the detention occurs (*Phillips*, 1844, 7 Man. & G. 325, per Tindal, C. J., at p. 328; *African Merchants Co.*, 1873, L. R. 8 Ex. 154).

Any directions contained in the contract as to the course to be followed between the given *termini* must be strictly adhered to, and any failure to

do so is a deviation (*Elliot, supra*). Where a number of successive ports of discharge are specifically named, they must be taken in the order in which their names occur in the policy; subject, however, to this exception, that the order may be varied in accordance with a uniform and clearly established usage not manifestly excluded by the policy. If they are not so named, they must be taken in the order most convenient and expeditious for the voyage, which is not necessarily the geographical order of distance from the port of departure. To revisit one of several ports, or to sail backwards and forwards from one to another, is, in general, a deviation (*Guiderer*, 1810, 3 Taunt. 16).

The strictness of the rule relating to deviation is modified both by usage, and by express agreement embodied in the written contract. The parties are understood to have had the custom of trade in view. Thus where it is usual, in the course of a voyage between given *termini*, to stop at intermediate ports which may even be out of the direct line, it is no deviation to stop there, although no express leave to do so is given. The usage, however, to have this effect, must be clear and sufficiently well established to warrant the presumption that it was known to both parties. No usage can be set up against the express words of the policy (*Elliot, supra*). Similarly, subject to the same rule, delay which would otherwise be deviation is justified by usage (*Noble*, 1780, 2 Doug. 510; *Fallance*, 1808, 1 Camp. 503).

The "touch and stay" clause in a marine insurance policy is intended to give a certain latitude. Here the question is mainly one of intention, to be gathered from a fair construction of the policy, as indicating both the main purpose and scope of the adventure and the risk undertaken. Express permission may be given to touch at particular ports. But, however wide the terms employed, this clause is never interpreted as giving liberty to touch at a port outside the voyage contemplated. "To touch at any ports in any order" means only ports which are substantially within the course of the voyage as thus determined (*Ledue*, 1888, 20 Q. B. D. 475; *Glyn* [1892], 1 Q. B. 337; *Caffin* [1895], 2 Q. B. 366). Similarly, the purpose for which the vessel puts in, even at a port expressly allowed, must, unless a contrary intention clearly appears, be one connected with the object of the voyage. This is true even where the permission given is to touch and stay "for any purpose whatever" (*Williams*, 3 Camp. 469, per Ld. Ellenborough at p. 473). If these conditions are satisfied, there is no deviation. Again, where it appears from the policy to have been contemplated by the parties, or where it is necessary for the purposes of the voyage insured, that the ship should have liberty to trade at a port, though the liberty expressly given is only to touch, trading there is not a deviation. And trading may even be lawfully engaged in, at a port where the vessel has liberty to touch, provided that the vessel has put in at that port for some allowed reason, and that such trading does not vary the risk or cause delay (*Metcalfe*, 1814, 4 Camp. 123; *Raine*, 1808, 9 East, 194; *Cornick*, 1809, 11 East, 346; *Laroché*, 1810, 12 East, 131).

Physical or moral compulsion is admitted to justify acts which otherwise would constitute deviation. Where a vessel was carried out of her course by a king's ship, and detained for six weeks, there was held to be no deviation (*Scott*, 1805, 1 B. & P. N. R. 181). The master has always an implied permission to do what is necessary for the preservation of the vessel and the lives of those on board. Thus it is no deviation to put into a port, though outside the regular course, in order to obtain provisions when the crew is starving, or to get repairs required for the safety of the

ship, or to replace officers or crew who have been lost during the voyage, and without whom it is not safe to proceed. It is otherwise if the need for repairs or stores, or the deficiency in the crew, existed at the beginning of the voyage, and the divergence or delay was found to be necessary to remedy the defect. Deviation is excused unless voluntary, but not if due to gross ignorance or want of skill on the part of the captain (*Phyn*, 7 T. R. 505). Anything reasonably required in self-defence is justified, *e.g.* taking refuge in port, or even attacking a hostile ship (*The San Roman*, 1873, L. R. 5 P. C. 301). It is a deviation for the ship to leave her course in the hope of meeting with prizes during war: but the policy is not necessarily avoided by carrying letters of marque, though without the knowledge of the underwriters (*Laurence*, 1805, 6 East, 45; *Parr*, 1805, *ib.* 202). Circumstances also, though falling short of absolute necessity, may excuse divergence or delay, *e.g.* stress of weather, mutiny, desertion, and sickness. In such cases, the question is one of circumstances, in which the master, in selecting the port at which he is to put in, must exercise his judgment and act as a prudent man in the interests of all concerned (*Phelps* [1891], 1 Q. B. 605). Joining convoy is a justification. And so, too, is the saving of life: not the saving of property, unless that is incidentally necessary to the saving of life, or unless, as is frequently the case, it is expressly allowed (*Scaramanga*, 1880, 5 C. P. D. 295). Where a ship does diverge in order to save property, the forfeiture of an insurance policy, and the risk of liability to merchants in consequence of deviation, are apparently elements to be considered in estimating the amount due for salvage (*The Edenmore*, [1893], P. 79).

Such necessity must in no case have been caused by the fault of the shipowner or the insured. A delay or divergence which is justifiable in the first instance becomes deviation if prolonged beyond the time reasonably necessary. The vessel is not required to return to the point of divergence, but must prosecute the voyage by the safest and most direct route from the point to which she has been driven (*Larabre*, 1779, 1 Doug. 284; *Delaney*, 1785, 1 T. R. 22).

[*Bell, Com.* ii. 669 foll.: *Abbott, Merchant Shipping*, 13th ed., 405 foll.: *Kay, Shipmasters and Seamen*, 2nd. ed., s. 175 foll.: *Smith, Mercantile Law*, 10th ed., i. 356, 451 foll.: *Arnould, Marine Insurance*, 6th ed., ii. 449 foll.]

See MARINE INSURANCE.

**Devolution.**—See ARBITRATION (vol. i. p. 298); ARTICLES OF ROUP; AUCTION; ENTAIL; JUS DEVOLUTUM.

**Dies cedit : dies venit.**—*Dies cedit* denotes the date at which a right vests; *dies venit*, the date at which performance can first be enforced by action. *Cedere diem significat, incipere deberi pecuniam*; *venire diem significat, cum diem venisse, quo pecunia peti possit* (*D* 50. 16. 213). The expressions are used in Roman law in connection with legacies and obligations.

In reference to legacies, *dies cedens* marks the *delatio* of the legacy; *dies veniens*, the *acquisitio* of the legacy. A legacy vests, *dies legati cedit*, at the death of the testator, if bequeathed unconditionally: though it is still defeasible by the failure of the testament. It was, indeed, provided by the Lex Papia Poppaea that an unconditional bequest should not vest until



the date of the opening of the testament (Ulp. xxiv. 31); but this was repealed by Justinian, who re-established the old rule of the *jus civile*. A conditional legacy does not vest until the condition is fulfilled. An unconditional legacy, again, becomes due and enforceable, *dies legati venit*, on the entry, *aditio*, of the heir. At that date the legatee becomes *ipso jure*, without any act on the part of the heir, owner of the subject which the testator has bequeathed to him.

In reference to obligations, the expressions mean respectively the date when the obligation begins to exist, and the date when payment may be exacted. From the date of the *dies cedens* the right forms part of the creditor's property, and is capable of novation, cession, or acceptilation; but the right cannot be enforced by action till *dies venit*. When a future date is agreed on for the performance of an obligation, the obligation at once comes into existence (*dies cedit*); but it is not prestable (*dies non venit*) until the agreed-on time arrives. It is only in a case of this sort, *i.e.* where the performance of the obligation is postponed to a certain date, that the *dies cedens* and the *dies veniens* of an obligation are distinct days. In simple unconditional contract, as soon as the contract is made, *dies et cedit et venit*; if, on the other hand, the contract is conditional, that is, where the performance is dependent on a contingency, *dies nec cedit nec venit nisi conditio extiterit*.

After a legacy vests (*post diem cedentem*) it is the property of the legatee, and as such is transmitted to his heirs. If, however, a legatee die before the date of vesting, *e.g.* before a condition is fulfilled, he transmits nothing to his heirs. Herein a conditional legacy differs from a conditional contract. For in a contract, although the creditor die before the date of vesting, *e.g.* before the performance of a condition, his right nevertheless passes to his heirs (*D. 36. 2. 5. pr.; D. 36. 2. 3.*). A fulfilled condition of a contract or promise, in other words, is retracted to the date of the promise, *i.e.* the obligation and the right of the other contracting party respectively date from the conclusion of the contract, as if it had been originally unconditional.

See CONDITIONAL OBLIGATIONS; LEGACY; VESTING.

**Dies dominicus non est juridicus.**—The Lord's day (Sunday) is not a day for judicial proceedings. See SUNDAY; DAY.

**Dies fasti: dies nefasti.**—The days of the year were divided by the Romans into *dies fasti*, *dies nefasti*, and *dies partly fasti*, partly *nefasti*.

*Dies fasti*, in the wider sense, were days on which legal and political business could be lawfully transacted. They included *dies fasti* in the narrower sense, and *dies comitiales*, days on which the *comitia* could legally meet, and on which, if the *comitia* did not meet, the Courts could sit.

*Dies nefasti* were days on which legal and political business could not be done. They were either *dies feriati*, days sacred to some festival (see FERIÆ), or *dies religiosi*, unlucky days declared to be such by decree of the Senate on account of some disaster which had taken place upon them.

In addition, there were certain days which were partly *fasti* and partly *nefasti*; on such days, *dies intercesi*, legal business could be transacted only during certain hours.

**Dies inceptus pro completo habetur.**—A day commenced is held as completed. For cases to which this maxim does or does not apply, see DAY.

**Dies incertus pro conditione habetur.**—An uncertain day is held as a condition. If an obligation is undertaken to be performed at a certain date which is sure to arrive, the mention of the date does not, of course, make the obligation conditional, but only postpones the performance of it. But, on the other hand, if the date is uncertain or may never occur, such as the date of a certain person's attaining majority, which he may never do, then the maxim applies, and the obligation is held as conditional (Bell, *Prin.* s. 47). While the maxim was originally applied to cases of contract, it has come to some extent to be recognised in the law as to vesting. If in a trust deed a gift is made in the form of a direction to pay at a person's majority or at the occurrence of some other uncertain event, then vesting is postponed; but if there is an unqualified gift, followed by a direction to pay at majority or at the date of some other event, then vesting is not postponed.—[M'Laren on *Wills*, 796.]

**Dies Interpellat pro Homine.**—"The day interferes, or makes the demand, on behalf of the man." The meaning of this maxim is that where fulfilment of an obligation is due on a certain day, the arrival of the stipulated day is itself deemed a sufficient demand on the part of the creditor: and, by failing to fulfil on that day, the debtor is *in mora*, and becomes liable in the consequences.—[Trayner, *Latin Maxims*, *h.t.*: Stair, i. 3. s. 7: i. 17. ss. 15, 18.]

**Diet.**—A diet of appearance (or compearance) is the day to which a party in a process, civil or criminal, is cited to appear in Court.

1. *In Civil Actions.*—Formerly, in all ordinary actions, there were two diets of compearance, depending on the fact that there were two summonses. Citing defenders in two diets was abolished by the Judicature Act, 1825. Failure to appear at a diet without admissible excuse forces the judge to grant decree by default. See DEFAULT. The 1876 Sheriff Court Act prohibits a Sheriff from granting delay, except in the case of there appearing to be some sufficient reason for it. The cases of absence mentioned in the above Act are: (1) diets of proof, (2) diets of debate, and (3) other diets in the cause. There is some difficulty in determining what the word "diet" means in the last instance: it is considered that it means some occasion on which the presence of the party is required by Statute or Act of Sederunt.—[Dove Wilson, *Sheriff Court Practice*, 4th ed., p. 280.] See CONTINUATION OF THE DIET; ADJOURNMENT.

2. *In Criminal Proceedings.*—A criminal diet is peremptory. Even of consent of both parties, it cannot be "called" on a day earlier than that appointed in the citation (Hume, ii. 263: Alison, ii. 343: Macdonald, 427). If the diet be not called on that day (whether it be an original or an adjourned diet) the instance, or particular libel, falls (*ibid.*). The right of prosecution is not thereby lost; it "may still be used in the raising of a new process on the same grounds and to the same effect" (Hume, *ibid.*; *Tubram*, 1872, 2 Coup. 259). See also ADJOURNMENT. If the prosecutor is not present, the Court may adjourn the diet, if satisfied that there is

good ground for his absence (Hume, ii. 266 *et seq.*); if not satisfied as to his absence, the Court may desert the diet (*ibid.*). If the accused fails to appear at the diet, after being publicly called, the trial cannot proceed. Unless satisfactory reasons are given for his non-appearance, sentence of outlawry is pronounced (*ibid.*); and, if he is on bail, his bail-bond is forfeited. An inferior Court, however, cannot pronounce sentence of outlawry, but may forfeit the bail-bond. The only objection on behalf of the accused which can be pleaded in his absence, is an objection to the citation. (But as to the limitation of this, see Macdonald, 429, and authorities cited.)

As to *First and Second Diets*, see CRIMINAL PROSECUTION.

*Desertion of the Diet.*—This signifies the judicial abandonment of proceedings on the particular libel on which the accused has been brought into Court. It does not involve the abandonment of the charge against the accused—the surrender of the right to prosecute him for the particular crime—but only the withdrawing of the particular libel. Where the diet is deserted *pro loco et tempore*, or where the diet is postponed or adjourned, it is no longer necessary to obtain a new warrant for the incarceration of the accused; the old warrant continues in force (Crim. Proc. Act, 1887, s. 52).

(1) The diet may be deserted *pro loco et tempore*. The prosecutor, if not prepared to proceed to trial, may move the Court to desert *pro loco et tempore*. Although this is entirely in the discretion of the Court (*Archibald*, 1768, Hume, ii. 276), the motion is usually granted as matter of course; but, if opposed, it may be refused if the granting of it would involve injustice to the accused (*McAtamney*, 1867, 5 Irv. 363). The prosecutor is not obliged to specify his reasons for making the motion (*McPhie*, 1763, in Burnett, *Criminal Law*, 310, note; Alison, ii. 356), as it may be contrary to the public interest to do so. If the motion be granted, the prosecutor may subsequently serve a fresh libel for the same offence (Alison, ii. 355; *Collins*, 1887, 15 R. (J. C.), 7; 1 White 482). It is competent to desert the diet *pro loco et tempore* even after the jury have been balloted for, but before they have been sworn. “Until the jury are sworn the prisoner is not in their hands, and it is quite competent to desert the diet” (*Martin*, 1858, 3 Irv. 177). In summary proceedings, the prosecutor may move to desert at any time before he has begun the examination of a witness on the merits (Brown, *Summary Jurisdiction*, 138).

By sec. 41 of the Crim. Proc. Act, 1887, where a person accused is cited to the High Court of Justiciary for the second diet, the Court has power to review the proceedings at the first diet, and where the accused has pleaded guilty to the whole or any part of the charge at the first diet, “the Court at such second diet, if it shall be shown that such plea was taken to an irrelevant or incompetent charge, or has been taken under substantial error or misconception, or under circumstances which tended to prejudice the person accused, may allow such plea to be withdrawn or modified, and where such plea is so withdrawn or modified, the Court shall, if the prosecutor shall so move, desert the diet *pro loco et tempore*, or postpone the trial to a later date, which shall be notified to the person accused in open Court.”

(2) The diet may be deserted *simpliciter*. This may either be (a) on the motion of the prosecutor, or (b) *ex proprio motu* of the Court. If the prosecutor move a desertion *simpliciter*, he cannot prosecute again for the same offence (Hume, ii. 277, case of *Leslie* there; Alison, ii. 357; Macdonald, 442). If, however, the Court *ex proprio motu* desert *simpliciter*, this does not necessarily prevent a subsequent trial upon a new libel for

the same offence (*Tabram*, 1872, 2 Comp. 259). Alison says that such desertion by the Court (if on account of some irregularity in the citation, or some error in the libel or the lists) "determines the fate of that particular process only, and cannot preclude the raising of a new libel in a more improved form" (ii. 357; *Buchan*, 18 Dec. 1727; Hume, ii. 277). The prosecutor may move for desertion of the diet *simpliciter*, even after a verdict of guilty has been returned by the jury: the effect of which is to free the accused from punishment, and to bar all subsequent proceedings against him for the same offence.—[Burnett, 310; Hume, ii. 275; Alison, ii. 98, 355; Macdonald, 441 *et seq.*; Brown, *Summary Jurisdiction*, 138; Rankine's *Ersk. Prin.*, 19th ed., 649.]

See CRIMINAL PROSECUTION; ADJOURNMENT.

**Digest.**—This is the name very generally given to the *Pandects* of the *Corpus Juris Civilis*.

See CIVIL LAW; ROMAN LAW; CORPUS JURIS.

**Dignitaries, Ecclesiastical.**—With the exception of the Moderator of the Church of Scotland, the Dean of the Order of the Thistle, and the Deans and Chaplains of the Chapel Royal, there are no ecclesiastical persons belonging to Scotland and recognised by law as of higher or other rank than that of a parish minister. The clergy of Dissenting Churches have no status recognised by law (*Drummond v. Farquhar*, 6 July 1809, F. C.). In legal processes and documents, they must neither design themselves nor sign their names with territorial titles, but with their Christian names and surnames, adding to their signature their office in their Church, if they please. The Moderator of the General Assembly ranks after bishops of the Church of England who are peers of Parliament, and before all barons. (See PRECEDENCE.)

**Dignities.**—Honours or titles of honour, such as emperor, king, prince, duke, marquis, earl, viscount, baron, baronet, knight. The dignities of emperor, prince, duke, signified originally that their possessors held military commands. The feudal dignities of earl, or count, baron, etc., were originally attached to feudal office—tenure of a feudal holding. When the holding was alienated the dignity went with it. All dignities, from that of duke downwards, are now strictly personal, whether hereditary or for life. (The barony of Torphichen is possibly an exception; Riddell, *Peerage Law*, 87.) If hereditary, they descend *jure sanguinis*, and vest without service or possession in the heir, according to the destination in the patent (*Ersk.* iii. 8. 77). In the absence of a destination, the presumption is that the dignity is limited to the male line. The eldest of heirs-portioners is heir to all dignities which descend to heirs female (*Stair*, iii. 5. 11). A dignity is indivisible; is not now capable of transference, or attachable for debt. Its assumption by the heir does not infer responsibility under passive titles (*Ersk.* iii. 8. 86). Lands of the holder of a dignity may be alienated, though the title of the dignity, which cannot be alienated, is derived from them. The only dignities recognised in this country are those conferred by the sovereign. Foreign dignities are said to confer here the rank of esquire only (2 Co. Lit. 607). In former times the rank of knighthood legally conferred in one feudal country was recognised in all others. The wife of the holder of a

dignity has equal rank with her husband. His widow retains that rank so long as she does not marry again. See PRECEDENCE.

The holder of a dignity of the peerage signs with the name of his dignity, without his Christian or surname. If he has more than one dignity, he signs with the name of the highest. His wife or widow signs with the same signature, prefixing to it her Christian name or its initial. If, however, she hold a higher dignity in her own right, she signs with the name of that dignity. In summonses, peers, when pursuers, are designed as "Our trusty and well-beloved Cousin and Councillor" (Mackay, *Manual*, 191). Petitions addressed to the Court of Session by peers begin with the word "Sheweth," omitting the word "Humbly," which is used by commoners. The House of Lords is the only Court of law which has cognisance of questions of right to dignities of the peerage.

[Ersk. ii. 2. 6; Bankt. i. 2. 32; iii. 5. 83; Bell, *Com.* i. 120; Bell, *Prin.* ss. 1659, 1679, 1825, 2138-2148; Innes, *Legal Antiq.* 73; 2 Co. Lit. 607.]

See PEERAGE.

**Dilapidation of Benefices.**—Prior to the Reformation, much of the Church land seems to have been lost by being set in feu by Churchmen, to the prejudice of their successors. After the Reformation, a series of Statutes was passed by the Scottish Legislature to check this abuse (see Stair, ii. 8. 17; Ersk. ii. 10. 7; Bankt. ii. 8. 110). In modern times, a minister has no power to feu or otherwise alienate his glebe, except under judicial authority (see GLEBE). The burden of maintaining the manse rests upon the heritors; but if the manse be declared to be a free manse, that burden—so far, at all events, as regards all ordinary upkeep and repair—is transferred to the incumbent (see MANSE).

**Dilatory Defences.**—See DEFENCES.

**Diligence.**—See CULPA; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; DAMAGES.

**Diligence of Creditors.**—"Diligences are certain forms of law by which a creditor endeavours to make good his payment, either by laying hold of and imprisoning the person of the debtor, or by securing his estate from alienation or embezzlement, or by carrying the property of it directly to himself" (Ersk. *Inst.* ii. xi. 1). The explanation of the term diligence as thus used, given by Stair (iv. 41. 1), is generally regarded as fanciful. He connects it with the ordinary meaning of the word: "because they excuse the users thereof from negligence, whereby posterior diligences being exactly followed, are preferable to prior diligences being neglected, *vigilantibus non dormientibus jura subveniunt*." The correct opinion is probably that of Ross (*Lectures*, 234), who thinks that the word is purely French, and is the ordinary practical term synonymous with the word *pursuit*.

The sentence of a judge is always a necessary preliminary to diligence. A creditor may proceed to use diligence when he has obtained a judgment in a suit against his debtor, or has extracted a deed registered in the books of a competent Court for execution in virtue of the debtor's consent. Bills

of exchange contain no clause of registration, but are registrable by Statute (1621, c. 20, 1696, c. 36). After a bill has been protested for non-payment, and the protest recorded along with a copy of the bill, an extract may be obtained containing a warrant upon which execution may proceed immediately against the whole parties, upon a charge of six days. Bonds and obligations granted to Her Majesty, though they contain no registration clause, may be registered for execution, and diligence may proceed upon extract (19 & 20 Vict. c. 56, s. 36). Even without a decree or registered obligation, certain diligences may proceed upon any liquid ground of debt, a warrant being obtained on presenting a bill in a competent Court. See BILL: BILL OF EXCHANGE; REGISTRATION. The creditor is not restricted to one form of diligence, but may use simultaneously all appropriate forms. Diligence may proceed against the debtor's person, or against his property (heritable or moveable).

### 1. DILIGENCE AGAINST THE PERSON.

*History.*—According to our earliest law the only diligence competent against an ordinary debtor was that against his moveable estate. This was due to the operation of the feudal law, which withdrew land from commerce, and rendered it unavailable to creditors, and prevented the attachment of the debtor's person, because it would be inconsistent with the right of the superior to the personal services of his vassal. Kings no doubt always exercised the power of imprisoning their debtors, and from a very early time imprisonment followed upon failure to implement decrees obtained on obligations *ad facta præstanda* within the obligant's power to perform. But in the case of the ordinary debtor personal execution was the last diligence to be introduced into our law. The Statute 2 Robert I. c. 19, first gave this remedy to creditors. This Statute, which is the foundation of the ACT OF WARDING (*q.v.*) peculiar to royal burghs, was borrowed from England, and incorporates almost verbatim the provisions of the *Statute Merchant* of 11 Edw. I. This Statute narrates that many merchants had fallen into poverty for want of a speedy remedy for recovering their debts, and therefore, "failing goods, the body of the debtor is to be taken and kept in prison till he agrees with his creditor." Except in royal burghs under an Act of Warding, the remedy thus introduced only applied to merchants, and by some authorities the Act is regarded as altogether spurious (Bell, *Com.* ii. 431). We find no statutory enactments extending the remedy till after the Reformation. Indirectly, however, imprisonment for debt came to be commonly adopted through the medium of the Church. It was customary for a debtor to bind himself by an oath to pay, and if he failed he became liable to Church discipline. Gradually enforcement of payment of debt came to be considered the province of the Church, and the authority of the Church was, if necessary, enforced by the arm of the law.

From a very early time the bishops had power to decide "all actions pertaining to faith of body, with power to cause the people keep their faith, and to punish them for violation thereof"; and by chap. 6 of Stat. Robert III. it was ordained that "all Justiciars, Sheriffs, and others the king's ministers shall wait upon, and answer to all letters of Caption to be direct to them, by all bishops and their officials, and shall cause make lawful execution of the same" (Balfour, 682.) The sentences of the Church Courts were followed by excommunication, and when this failed to produce the desired effect, a writ of Caption was issued, which the civil Courts were bound to enforce. By 6 James II. c. 12, besides being excommunicated by

the Church, absconding debtors, who left no property behind them, were made rebels to the king, by being proclaimed outlaws or put to the horn. As the Reformation approached, the power of the Church, which was losing its hold on the people, was supported by more drastic measures, and it was provided by 4 James v. c. 9, that both body and goods might be attached at the same time for liquid debts; and if the debt was not thereby paid, and the person had been *cursed* for not doing any act or deed, he should be denounced a rebel.

At the Reformation the jurisdiction of the Church in these matters was swept away. It was soon found necessary to provide a substitute: and COMMISSARY COURTS (*q.v.*) were established in 1563, and to them was transferred the jurisdiction formerly exercised by the Church Courts. Upon the decrees of this Court *in facto* the Court of Session issued letters of four forms, and letters of poinding upon its decrees for payment of money. It was provided by the Statute 1584, c. 139, that letters of horning, as well as of poinding, should follow on the decrees of the Supreme Court as well as upon decrees of other judges, to which the authority of the Lords of Session should be interponed. In practice, however, the old style of four forms continued to be used for some time afterwards. But by Act 13 James VI. c. 181, it was enacted that, upon the decrees of magistrates in burghs, letters of four forms were to be reduced to one charge of ten days. This was extended to decrees of other inferior Courts by the Acts 1606, c. 10; 1607, c. 6; 1609, c. 15; 1612, c. 7; and finally to those of the Court of Session itself by A. of S. 23 November 1613.

[Bell, *Com.* ii. 430 *et seq.*; Kames, *Law Tracts*, 331 *et seq.*; Ross, *Lectures*, i. 234 *et seq.*; M. Bell, *Lectures*, i. 519.]

**LETTERS OF FOUR FORMS.**—Imprisonment for failure to perform obligations *ad facta præstanda* used to proceed upon *letters of four forms*. These letters directed four successive charges to be given to the obligant at intervals of three days, and, on failure to perform, he had the alternative given him of entering himself a prisoner in one of the jails: if he did not do so, he was denounced rebel, and letters of Caption followed. When the decree, upon which letters of four forms were issued, was pronounced by an inferior judge, the creditor had to raise an action in the Supreme Court in which he produced his decree, and got another in similar terms, called a "decree conform," on which the letters were raised. The change to the more modern style of letters of horning is supposed to have been brought about by the practice of taking debtors bound to consent to execution upon a single charge. This more summary method introduced upon registered deeds was extended to decrees obtained *in foro contentioso* by the Acts cited *supra*.

**LETTERS OF HORNING**, which thus superseded the older form, not only proceeded upon a single charge, but charged the debtor to pay within the specified number of days under pain of rebellion, without giving him the alternative of voluntary surrender. Rebellion was thus the direct consequence of failure to pay the debt, and the debtor legally incurred all the severe penal consequences of rebellion. The imprisonment which followed was imprisonment not as a debtor but as a rebel.

The proceedings necessary to obtain letters of horning were also simplified. Upon production of a decree, the authority of the Court of Session was interponed summarily, and came to be granted by an interlocutor upon a bill addressed to the Court by the creditor. The letters were then placed in the hands of a messenger-at-arms for execution. The messenger thereupon charged the debtor to pay, and returned a certificate

—called his execution or “indorsation.” The days of charge having elapsed without payment, and the debtor having been denounced rebel in the terms narrated *supra*, the creditor applied for letters of *caption*. This was done by presenting a bill narrating accurately the procedure which had been followed. Upon this bill the interlocutor “*Fiat ut petitur*, because the Lords have seen the registered horning,” was written and signed by the Bill Chamber Clerk. This formed the warrant for letters of *caption*. These when issued, were a sufficient warrant to any messenger-at-arms to apprehend the debtor and put him in prison.

[*Ersk. Inst.* iv. 3. 9; *Ross, Lectures*, i. 280 *et seq.*; *M. Bell, Lectures*, 520 *et seq.*] See also HORNING.

**EXECUTION UNDER THE PERSONAL DILIGENCE ACT.**—The old forms of diligence by letters of horning and *caption*, though still competent, have been practically entirely superseded by the provisions of the Personal Diligence Act, 1838 (1 & 2 Vict. c. 114). By this Act it is provided (ss. 1 and 9) that when an extract shall be issued of any decree pronounced by the Court of Session, Teind Court, Justiciary Court, or Sheriff Court, or of a decree of registration of a bond or other document upon which execution may competently proceed, the extractor shall insert a warrant to charge the debtor to pay within the days of charge under the pain of poinding and imprisonment, and to arrest and poind. Extracts of decrees are thus made equivalent to extracts of such decrees followed by letters of horning, or of horning and poinding in the older form. In virtue of such extract (s. 3) it is lawful to charge the debtor precisely in terms of the decree. Upon expiration of the days of charge, and within a year and a day, the execution, which must set forth with strict accuracy the nature and particulars of the warrant, may be registered in the Register of Hornings. Such registration has the same effect as if the debtor had been denounced rebel in virtue of letters of horning; and also accumulates the debt and interest into a capital sum, bearing interest. It is then competent to apply for warrant to imprison the debtor, as it formerly was to apply for letters of *caption*. The application is made in the Bill Chamber or Sheriff Court, as the case may be, and presented to the Clerk, who writes thereon the words “*fiat ut petitur*,” and adds his signature and the date. It is essential that the *inducie* should have expired before an application for warrant of imprisonment is made (*M. Bell, Lectures*, i. 526 *et seq.* See CITATION: PERSONAL DILIGENCE ACT: CHARGE).

After the issue of the warrant to imprison (or letters of *caption* in the older form), the messenger proceeds to execute the warrant by touching the shoulder of the debtor with his wand, and informing him that he is his prisoner. He then lodges the debtor in prison. A debtor is protected against personal diligence by retiring within the Abbey of Holyrood, or precincts thereof; but this privilege of sanctuary is of no avail from the moment that the messenger has executed the first step in carrying out the warrant of imprisonment, by touching the debtor on the shoulder. Imprisonment for debt is now abolished by the Debtors Act, 1880 (43 & 44 Vict. c. 34), except for (1) taxes, fines, and penalties due to Her Majesty, and rates and assessments lawfully imposed, and (2) sums decreed for aliment, which are also dealt with by the Civil Imprisonment Act, 1882, 45 & 46 Vict. c. 42. (See IMPRISONMENT: SANCTUARY; ACT OF GRACE; CESSIO BONORUM.)

**THE MEDITATIO FUGÆ WARRANT** is a diligence used against a debtor who has the intention of leaving Scotland to avoid fulfilling his obligation. It is competent for the creditor who has reasonable ground to suspect such an intention to apply to a magistrate, who, on inquiry



and on being satisfied that there are grounds for the application, grants warrant for apprehending the debtor for examination, and may thereafter grant warrant of imprisonment until caution *judicio sisti* be found. No *meditatio fuge* warrant can be executed out of Scotland, but it may be granted at the instance of a creditor who resides out of Scotland, provided he has a mandatary in Scotland. The warrant may be granted against a foreigner. Apprehension and imprisonment under this warrant are expressly excluded from the operation of the Debtors Act, 1880. (But see the case of *Hart*, 1890, 18 R. 169, where it was held that the warrant was not competent in a case where imprisonment after decree would be incompetent.) By finding caution *judicio sisti*, a debtor imprisoned on a *meditatio fuge* warrant is always released. See MEDITATIO FUGE.

*The Border Warrant* is analogous to the *meditatio fuge* warrant. It is now in desuetude. It was a warrant granted by any Sheriff of a county on the borders of England for arresting a debtor who resided on the English side, if he were found in Scotland, and for detaining him till he found caution *judicio sisti*. See BORDER WARRANT.

## II. DILIGENCE AGAINST PROPERTY.

This may be (A) Real or (B) against Moveables.

*History.*—Attachment of the debtor's moveables was the earliest diligence recognised in the law of Scotland. Pointhing, by which the debtor's moveables were directly transferred to the creditor, was a diligence known in our earliest law, and is described in *Quoniam Attachimenta*, c. 49. Letters of pointhing, corresponding to a writ of *fieri facias* in England, were used, in virtue of which the goods on the debtor's lands were carried to the market cross of the head burgh of the sheriffdom, and there sold. If a purchaser was not found, goods were appraised to the value of the debt and handed over to the creditor. This diligence was at first exercised under a brieve from Chancery addressed to the Judge Ordinary. But "the inattention of our inferior judges, the changes and irregularities in the procedure of our Courts, brought about a total neglect of the preliminary forms. The ancient brieves, or fixed writs of our Courts, upon which all actions commenced, were dropped; complaints and summonses succeeded; and consequently no previous bail was demanded from the defendant either for appearance, during the course of the action, or for obedience to the sentence to be given" (Ross, *Lectures*, 266). The Judges Ordinary seem then to have adopted the practice of enforcing their own decrees by issuing warrants of pointhing, directed to their own officers, which could be executed within the jurisdiction of the judge granting the warrant. After the establishment of the Court of Session, the judges of that Court also issued letters of pointhing under the signet upon their own decrees, or (by Act 1661, c. 29) on production of a decree of an inferior judge, which might then be executed in any part of Scotland.

This seems to have been at first the only remedy open to an ordinary creditor, owing, as stated above, to the operation of the feudal law. But the fetters against the alienation of land were broken down at an early period, and we find by Statute of Alex. II. c. 24, a provision that the debtor's moveables were to be first distrained upon a brieve of distress, and, in default of these, as much of his heritage was to be sold as would satisfy the creditor. No provision was made by the Statute for a case where a purchaser could not be found, but in practice the judges in such an event adjudged land to the creditor. By 2nd Stat. Robert I. c. 19 (the Statute Merchant, borrowed from England), a merchant creditor was given the

privilege of entering upon the debtor's land, of which he might retain possession till his debt was paid. He was not entitled to have the land sold. "It appears from our records that sometimes land was sold for payment of debt upon the above-mentioned Statute of Alexander II., and sometimes that security only was granted upon the land by authority of the Statute of Merchants" (Kames, *Law Tracts*, 321). The debtor had no power of redemption under the law as it stood prior to 1469, but in that year a Statute was passed (c. 3) giving to the debtor a power of redemption within seven years. This necessarily rendered the power of sale practically nugatory, and the result was that the diligence came to be restricted to a redeemable transference of an appraised portion of the estate. After briefs fell into disuse, letters executorial, called letters of apprising, were issued upon decrees obtained upon a summons. They were at first directed specially to the Sheriff within whose territory the lands lay, but afterwards to messengers-at-arms. This led to great abuses. Forms were neglected and lands were not properly valued. It also became the custom, probably in consequence of the disorder which had crept in, to transfer the proceedings to Edinburgh, and gradually the system was introduced of allowing the creditor to enter on the whole of his debtor's lands upon a redeemable title. A creditor thus entered drew the whole rents without accounting for them, no matter what the amount of the debt due to him. The Acts 1621, c. 6 and 7, and 1661, c. 62, were passed to remedy this state of matters, by providing that the rents beyond the value of the interest upon the debt should be imputed to the discharge of the principal, and ranking *pari passu* all apprisings led within a year and a day of the first. The Act 1672, c. 19, put the diligence upon a new footing altogether, by substituting for letters of apprising the action of adjudication (Kames, *Law Tracts*, 313 *et seq.*; Bell, *Com.* i. 739. See also ADJUDICATION FOR DEBT.

A. *REAL DILIGENCE*.—Real diligence is (1) that by which the creditor goes against his debtor's heritable estate, or (2) that which can only be exercised by a creditor who has a security over, or right in, such estate. It comprises—

(1) *The Action of Adjudication*, introduced, as we have seen, by the Act 1621, c. 6. By this diligence the debtor's heritage is transferred to the creditor, in satisfaction of his debt or in security therefor. It proceeds upon a liquid document of debt, or upon a debt constituted by a decree ascertaining its precise amount. All heritage, in its widest sense, including heritable rights, such as heritable bonds and real securities, and rights having a tract of future time, and personal rights to lands, are adjudgable. Adjudications may be general or special. In a general adjudication, the debtor's whole right is adjudged. In a special adjudication, only such part of the debtor's real estate is adjudged as corresponds to the principal debt and interest, with a fifth part more.

The action proceeds against the debtor if he be alive, but if not, then against his heir-at-law, or if the debtor have left no heirs, against the Crown as *ultima hæres*. Adjudications, with the possible exception of adjudications *contra hæreditatem jacentem* (*q.v.*), are not competent in the Sheriff Court, but must be raised in the Court of Session. The adjudger does not acquire an absolute right of property in the subjects conveyed to him. The debtor has a right of redemption within ten years in general adjudications, and five in special; but after the expiry of that period, termed *the legal*, the adjudger may obtain an irredeemable right by a decree in an action of declarator of expiry of the legal. See ADJUDICATION.

(2) *Adjudication in Implement*.—Where a conveyance of heritage has been

granted which is feudally defective, owing to the omission of a precept or procuratory, or where the grantee's right stands on a mere personal obligation to convey, which the granter refuses to complete by conveyance, an action of adjudication in implement may be raised. When decree is obtained, the subjects are conveyed to the adjudger irredeemably, as if the obligation had been carried out voluntarily.

(3) *Inhibition* is a writ passing under the signet by which the debtor is prohibited from selling, disposing, or burdening his heritable property to the prejudice of the inhibitor's debt, and the lieges are prohibited from accepting any such conveyance. This diligence may proceed not only upon a decree of Court, or of registration, or a liquid ground of debt, but may proceed in security of a debt not yet due, provided the debtor be *vergens ad inopiam*, and also upon a depending action when the summons contains pecuniary conclusions other than for expenses merely. Inhibitions are published by registration in the General Register of Inhibitions. They do not affect *acquirenda*, and the diligence strikes only against subsequent voluntary deeds of the debtor. It confers upon the inhibitor no right of a positive or active kind (unless followed up by an adjudication), except the right to challenge debts, and reduce deeds made *specta inhibitione*. This diligence, being purely personal, falls with the death of the person inhibited, and to be effectual against the heir must be renewed: but a deed granted in violation of inhibition may be set aside after death. Inhibitions prescribe in five years. See INHIBITION.

(4) *Poinding of the Ground*.—This diligence proceeds upon *debita fundi*, and is used to attach the goods upon the lands over which the creditor's security extends. It is the appropriate diligence when the debtor is himself in possession of the lands—when they are let to tenants, an action of mails and duties is the proper process. Poinding of the ground is competent to creditors in debts which constitute a real burden on the lands, but is not open to such as are in possession of the land upon a title equal to that of proprietors. A creditor, however, under a bond and disposition, who has entered into possession under a decree of mails and duties, is not thereby barred from poinding. Both tenants and proprietors of the ground must be made parties to the process, but there is no personal conclusion against them. The diligence being for the purpose of attaching goods, is not affected by the death of the debtor, but may be put in execution during the lifetime of the creditor. See POINDING.

(5) *The Action of Mails and Duties*.—This is the process used to attach the rents of heritage, and it may be raised by the holder of a personal right to land, a heritable creditor, or any one who has an express or implied assignation of rents. Upon the right of a holder of an *ex facie* absolute disposition, qualified by a back-bond, see *Scot. Herit. Sec. Co.*, 1876, 3 R. 333; see also *Neils*, 1863, 2 M. 168. Decree may be obtained for past rents, and all which are to become due, until satisfaction of the debt. See MAILS AND DUTIES.

(6) *Ranking and Sale*.—This is an action whereby the heritable property of an insolvent debtor is sold, and the price divided among the creditors judicially. The action can be raised only by a creditor who holds a real security. Since the Bankruptcy Act, 1856, this action has been practically superseded, but it is still competent (*Cannon's Trs.*, 1883, 21 S. L. R. 101). See RANKING AND SALE.

B. *DILIGENCE AGAINST MOVEABLES*.—This comprises—

(1) *Arrestment and FORTHCOMING*.—Arrestment is the process by which a creditor attaches money due to his debtor ("common debtor"), or moveable

effects belonging to him in the hands of a third party ("arrestee"). Arrestment may be made in security of a debt which is not liquid: when the debt is liquid, arrestment is made in execution. The diligence may proceed upon (1) decrees or registered obligations; (2) any liquid ground of debt, such as a bond, though not registered and even, when the debtor is *vergens ad inopiam*, though the time of payment has not come, or the obligation be conditional; (3) the dependence of an action to constitute an illiquid claim. A warrant to arrest may be granted either by the Court of Session or an inferior judge. The proper subjects of arrestment are personal debts and moveables in the possession of persons other than the debtor himself, and ships. As a rule, alimentary funds, such as servants' wages, are not arrestable. Arrestment, as soon as it is laid on, renders the subject arrested *litigious*, so that the diligence cannot be excluded by the posterior voluntary deeds of the debtor, or diligence of other creditors, unless there be *mora*: but it is only inchoate diligence, and requires a furthercoming to complete it. An action of furthercoming may be raised in the Court of Session or inferior Courts. It proceeds upon (1) the debt due by the common debtor to the arrester, (2) the arrestment, and (3) the debt due by the arrestee to the common debtor, and concludes for payment out of the sum arrested, and may also conclude for a warrant to sell arrested goods to satisfy the debt. Where there are competing claims to the fund, an action of MULTIPLEPOINDING (*q.v.*) is the proper process.

Arrestment *jurisdictionis fundandæ causa* is not a diligence, as it lays no *nerus* on the subject arrested. See ARRESTMENT.

(2) *Poin ding*.—By this diligence the debtor's moveables are valued and sold, and the price handed over to the creditor, or, failing a purchaser, goods to the value of the debt are transferred to him. It may proceed upon letters of horning, but now usually proceeds upon warrants contained in the extracts of decrees or registered obligations, as provided by the Personal Diligence Act (*ut supra*). These warrants contain in one the authority to charge the debtor and to poind his moveables. Poin ding can proceed only after expiry of the days of charge. Goods in the creditor's own possession may be poinded. Goods of which the debtor is not full proprietor cannot be poinded, nor PLOUGH GOODS (*q.v.*) during the time of labouring the ground. Except for unpaid wages of seamen, arrestment, and not poinding, is the appropriate diligence to attach ships and goods on board. The procedure is regulated by secs. 23–30 of the Personal Diligence Act. See POINDING.

(3) *Sequestration of a Tenant's Effects* under the landlord's hypothec for rent is of the nature of a diligence. It proceeds upon the warrant of the Judge Ordinary in a process of sequestration, whereby the landlord converts his general right into a real right of pledge, and satisfies his claim by turning the tenant's effects into money. See HYPOTHEC.

*Mercantile Sequestration* operates as a combination of all diligences against property, heritable or moveable, for behoof of the creditors as a body. It is equivalent to a decree of adjudication of the bankrupt's heritable estates for payment of his whole debts, and also to arrestment and decree of furthercoming and a completed poinding. It cuts down other diligences as provided by the Bankruptcy Act, 1856, which declares, (s. 108) that "no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual." [See Bankruptcy Act; also Goudy on *Bankruptcy*, pp. 255–60. See SEQUESTRATION.]

*Diligence after the Debtor's Death*.—(a) *Against Heritage*.—By the

Act 1661, c. 24, the creditors of the deceased are preferred to those of the heir, provided they do diligence against the lands within three years of the ancestor's death. After the expiry of the three years the ancestor's creditors, though they have done no diligence, may challenge the deed of the heir, but lose their preference in a question with the heir's creditors (Ersk. *Inst.* iii. 8. 101; see ADJUDICATION). (b) *Against Morrables*.—A creditor of the deceased debtor may proceed against the executor who has been confirmed upon the estate, or, where there has been no confirmation, he may get himself confirmed as *executor-creditor*, to the effect of administering so much of the estate as may be sufficient to satisfy his debt. Confirmation as executor-creditor is of the nature of a diligence, and vests the real right in the creditor so confirmed. Diligence begun during the deceased's life may be prosecuted, and will have effect against the executry. (Bell, *Com.* ii. 77 *et seq.*; Ersk. *Inst.* iii. 9. 34; Menzies, *Conc.* 489. See EXECUTOR-CREDITOR.)

*Alienations in Defraud of Diligence*.—The principle of common law *pendente lite nihil innovandum* is extended to diligences. The second branch of the Act 1621, c. 18, provides that any voluntary payment or right to any person, in defraud of the lawful and more timely diligence of another creditor, may be cut down by that creditor. Thus, under this Act, a creditor who has taken the first step only of his diligence can set aside a trust conveyance granted for the general behoof of creditors. The grounds of challenge are, that the alienation, which must be voluntary, has been made after diligence, appropriate to attach the subject alienated, had commenced; and that the debtor was at the time insolvent, notoriously or within the knowledge of the receiver of the deed. The diligence must have begun in a regular manner, and be proceeded with within a reasonable period. The remedy is now of little importance, owing to the provision of the Debtors Act, 1880, applying to ordinary debtors, that the expiry of a charge concurring with insolvency constitutes notour bankruptcy. (Goudy on *Bankruptcy*, p. 59 *et seq.*; Ersk. *Inst.* iv. 1. 37; Bell, *Com.* ii. 186. See also LITIGIOSITY and INSOLVENCY.)

*Equalising of Diligences*.—At common law and until comparatively modern times the creditor who first used diligence obtained an exclusive preference over the estate thereby attached. The first statutory enactments equalising diligences were passed in the interest of heritable creditors, viz., the Act 1661, c. 62, which provided for the *pari passu* ranking of comprisings or adjudications, and the Act 1681, c. 17, which introduced the process of RANKING AND SALE (*q.v.*). See also ADJUDICATION. The preference acquired by other creditors was not interfered with till the passing of the first Sequestration Act in 1772 (12 Geo. III. c. 72). The law now regulating this matter is contained in the Bankruptcy Act, 1856, which provides by sec. 12 that "Arrestments and poudings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date" (Bell, *Com.* ii. 72; Menzies, *Conc.* 310). See BANKRUPTCY; SEQUESTRATION.

*Abuse of Diligence*.—The use of diligence is always *periculo petentis*, and where injury is caused a claim for reparation will arise if the diligence used is nimious or groundless, or irregularly carried out. Special care must be exercised where the warrant is not obtained as a matter of course, but upon cause shown, whereby the Court has been induced to grant the order, as in the case of warrants to apprehend a debtor *in meditatione fugæ*. If the decree upon which the diligence proceeds be regular, and the execution

regularly carried out, the user will not be liable though it turns out that the decree is reducible upon its merits, nor upon the ground that a milder remedy was available. A mistake in the messenger's execution, if not merely clerical or trivial, or any deviation from the procedure laid down in the Personal Diligence Act, will invalidate the diligence and found an action against the user. A creditor who proceeds with a diligence after the debtor has duly tendered the amount decreed for and expenses of extract, is liable; so also if the debtor have obtained a sist of diligence, provided the creditor knows of it. (*Glegg, Reparation*, 169 *et seq.* See CIVIL PROCESS, ABUSE OF: see also the separate articles on the various forms of diligence.)

*Suspension of Diligence.*—A debtor who thinks diligence has proceeded against him without sufficient cause, or is being carried on irregularly, may obtain a stay of execution, till the rights of parties can be determined by a final judgment, if he can make out a sufficient *prima facie* case. A note of suspension must be presented in the Bill Chamber of the Court of Session, setting forth the charge, or threatened charge, and craving relief, with a statement appended of the facts and pleas in law on which suspension is grounded. The Court of Session alone has jurisdiction in this matter, except in the case of charges for sums under £25, when the suspension may be raised in the Sheriff Court (Personal Diligence Act, s. 19). "There are four stages of diligence at which suspension may be applied for: (1) A charge may be threatened or have been executed, but nothing further done, either the days of charge not having expired, or the charger having delayed or neglected to follow out his charge by poinding or imprisonment. In this case the remedy is a simple suspension. (2) An expired charge may have been followed by poinding, but a sale not yet executed, in which case the remedy is suspension and interdict. (3) An expired charge may have been followed by imprisonment, in which case the remedy is suspension and liberation. (4) An expired charge may have been followed by both imprisonment and poinding, in which case the remedy is suspension, liberation, and interdict" (*Mackay, Manual*, 421. See SUSPENSION).

*Diligence by the Crown.*—See EXCHEQUER, COURT OF: EXTENT, WRIT OF: CROWN DEBTS.

### **Directors Liability Act, 1890** (53 & 54 Vict. c. 64).—

Prior to the passing of this Act the director of a company could not be sued in an action of damages for a false statement, unless he was guilty of fraud. And in *Derry*, 1889, 14 App. Ca. 337, it was decided by the House of Lords that, if a man honestly believes a statement, he is not guilty of fraud, though he has no reasonable ground for his belief.

By the above Statute the following persons are responsible generally for all untrue statements contained in the prospectuses and notices of companies, *i.e.* every person, who is a director of a company: who has authorised his being named as a director, or as having agreed to become a director immediately or after an interval of time; who is a promoter of the company, or has authorised the issue of the prospectus or notice (s. 3).

*Conditions as to bringing an Action.*—The action can be brought only in respect of a false statement contained in a prospectus or notice issued subsequent to 18 Aug. 1890 (date of Act); the untrue statement must be contained in the prospectus or notice, or in a report or memorandum referred to in, or issued along with, such prospectus or notice; and the person suing must have subscribed for a share, debenture, or debenture stock on the faith of the prospectus or notice (s. 3 (1)).

*Defences.*—It is a good defence to an action brought under the Act that the defender had reasonable ground to believe and did up to the time of allotment believe, the statement to be true; if the statement be made by an engineer, valuer, accountant, or other expert, that such expert is correctly reported, and that at the date of his appointment the defender has reasonable ground to believe that he was competent; and, if the statement be that of an official person, that he is correctly reported. A defender may also escape liability by showing that, although he had consented to become a director, such consent was withdrawn before issue of the prospectus or notice; that the prospectus or notice was issued without his consent or knowledge, and that, after becoming aware of the issue, he gave reasonable public notice that such issue was without his knowledge or consent; or that, on his becoming aware of an untrue statement in the prospectus or notice, he withdrew his consent and caused reasonable public notice of his withdrawal to be given.

By the 4th section provision is made for the indemnity for costs incurred by those who are wrongly named as directors in the prospectus: who have withdrawn their consent to become directors, or who have not authorised or consented to the issue of the prospectus or notice. The 5th section deals with the question of contribution among those responsible, where one alone has been successfully sued (*Lindley's Supplement to the Law of Companies*). See under FRAUD; JOINT-STOCK COMPANIES.

**Discharge.**—Discharge is the name applied to the document by which obligations are formally extinguished. The first thing to be considered is the capacity of the creditor to grant such a deed, and the following special cases may be distinguished:—

*Pupils.*—The father as the administrator-in-law (assuming that he is solvent), and all tutors, may grant discharges without special powers (*Cattunagh*, 1858, 20 D. 1206; *Graham*, 1735, Mor. 16339). And though tutors may not alter the pupil's succession, this power extended to heritable bonds long before they were rendered moveable as regards succession: and the power covered, and still covers, the granting of an assignation in lieu of a discharge (*Fraser, P. & C.* 252). Under the Guardianship of Infants Act, 1886, the mother "has apparently just as good a right to grant a discharge as the father would have had had he been alive" (Ld. Pres. Inglis in *Jack*, 1886, 14 R. 263).

*Minors.*—The Court have refused to compel a debtor to pay to a minor without curators (*Kirkman*, 1782, Mor. 8977) or to a curator *ad litem* (*Pratt*, 1858, 17 D. 1006). The former case had reference to the principal sum under an heritable bond. But a minor with no curators may by himself alone give good receipts for income. This was recognised in *Kirkman's* case, where the distinction was taken between "principal sums" for investment and sums "which might be necessary for a minor's support." The difficulty of applying this distinction is recognised and dealt with by Ld. Pres. Inglis in *Jack* (*supra*), where it was held that minor children, found entitled to sums of £50 a-piece as damages for the death of their father, were capable of granting valid discharges therefor, on the ground that such sums were "intended to satisfy the immediate purposes of maintenance and education." Of course, if the minor have curators, any discharge by him without their consent is clearly bad, except in so far as the money may actually have been applied *in rem versum*. And though it is somewhat difficult to see why a minor's discharge, granted in exchange for full payment of a principal

sum, should not be effectual and unchallengeable if he have no curators, it can never be safe for the debtor to take such a discharge extrajudicially, not only because of the expressions of opinion in *Kirkman's* case, to the effect that even full payment would not be a protection "unless the money were to be afterwards profitably employed for the minor's behoof," but also because the debtor cannot know whether there are or are not curators. Curators may concur without special powers.

*Curators bonis* do not require special power (*Wills*, 1879, 6 R. 1096); nor even in the case of heritable securities, do they require to make up titles in their own names (*Scott*, 1856, 18 D. 624). This last case covers all judicial factors in the position of guardians to wards, but it expressly does not extend to include judicial factors upon lapsed trusts and similar officers, the distinction being that the former merely exercise powers on behalf of another living person, while the latter hold the title in their own persons and act as principals.

*Married Women*.—In the case of discharges where the debt is being paid in full, there appears little necessity for a ratification.

*Liferenter and Fiar*.—Both must concur.

*Fiars in Succession*.—If the discharge of an heritable security is to be granted by the substitute, he must complete title, which he may do by special service, or general service and notarial instrument (*Hare*, 1889, 17 R. 105). But in the case of a personal bond, such a substitute does not require confirmation (*Monro*, 1733, *Elchies*, "Service and Confirmation," No. 1).

*Executors* must be confirmed and (in the case of heritable securities) must complete title. But if they are also general disponees, the condition as to confirmation does not concern the debtor in an heritable bond. If the bond has been originally taken in name of an executor-nominate who has since died, there is no perfect and simple form of title: resort may be had to declaratory adjudication or the appointment of a judicial factor (*Currie on Confirmation*, 197–201); but if it is a case of an executor-dative, his executor may complete a title (*Currie*, 196).

*Trustees*.—If an heritable security runs in name of trustees, and additional trustees have since been assumed, it is unnecessary to make up any title in name of the latter so long as any *one* of those named in the bond is surviving and acting, and is a party to the discharge with the other trustees. In such a case care must be taken to see that the deed is signed by at least a quorum of *all* the trustees, including in such quorum the surviving and acting original trustee, who, under such circumstances, is the only holder of the feudal title.

*Trustees in Sequestration* grant the discharge in their own names with consent of the commissioners.

*Trustees in Cessio* have no title to discharge heritable securities without a disposition *omnium bonorum*, with notarial instrument thereon.

*Liquidators* in all cases grant discharges (as all other deeds) not in their own names, but in name of the company. The liquidator signs his own name and affixes the company's seal. If it is a judicial liquidation, the sanction of the Court is necessary, unless dispensed with under sec. 96 of the Companies Act, 1862. A liquidator in a voluntary liquidation does not require such sanction (s. 133 (7)). And the same is the rule in the case of a liquidator under the supervision of the Court, "subject to any restrictions imposed by the Court" (s. 151).

It is often a question of great importance whether the creditor is bound, on receiving payment, to grant an assignation, or is entitled to insist on the payer accepting a discharge. The following quotations are in point: "The



debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it, but the creditor cannot be compelled to grant an assignation unless the debtor shall consent, and the granting of the assignation shall not interfere with any other interest of the creditor himself" (Bell, *Prin.* s. 557). "A person paying a debt in ordinary circumstances is entitled to ask for an assignation to the creditor's rights and securities against the debtor, provided it can be shown clearly that no prejudice of any kind can be done to the rights of the creditor granting the assignation; and it always lies upon the party asking the assignation to show that such prejudice will not and cannot be done" (Ld. Pres. Inglis in *Guthrie*, 1880, 8 R. 107). The mere fact that the debtor does not consent will not deprive the payer of the right to an assignation if he is entitled to it on reasonable grounds, and probably the true force of the words "unless the debtor shall consent," in the above passage from Bell's *Principles*, is to be found in Ld. Mackenzie's *dictum* in *Smith* (1844, 6 D. 1164): "A third party is not entitled to say to a creditor, I want an investment; give me yours; here is payment of your debt"; whereas that position would be quite tenable if it were based upon the consent and co-operation of the debtor, assuming that the other condition were fulfilled, viz. no prejudice to be sustained by the creditor. If the granter of a bond and disposition in security sells the property under burden of the bond, he no doubt remains liable, but he is entitled to an assignation if called upon to pay (*North Albion Co.*, 1893, 21 R. 90).

There are two special cases of assignations being called for which may be particularly referred to. These are—

1. A cautioner or a third party pays interest on a debt, and asks for an assignation thereof and of the securities to that extent. If such an assignation is granted at all, it ought to be expressly postponed to the creditor's claim and security for principal, and all current and future interest, and all other sums which are or may become due to the creditor under the bond.

2. It sometimes happens, in practice, that where sums are recovered from more than one co-obligant or cautioner, the securities are wholly assigned to the one who satisfies the balance of the creditor's claims by happening to make the *last* payment. This is obviously inequitable and wrong. The point requires careful consideration when a subsequent assignation is tendered by such assignee, or an absolute title based upon the exercise by him of a power of sale contained in the security.

*THE FORM OF DISCHARGE* of an heritable security is given in Sched. N N of the Consolidation Act, 1868. The discharge is recorded in order to clear the register; but it is in accordance with principle that, if it be the fact that the debt is paid, the security falls (subject to the possibility of questions with a *bonâ fide* assignee); for there then remains nothing to be secured (Bell, *Prin.* s. 909). This being both self-evident to common sense and well founded in law, the moral is, that discharges of securities ought to be framed in the very simplest and shortest form possible. Anything like a detailed description is entirely out of place, and even a description by reference to any other deed (except the bond itself) may usually be improved upon. Suppose the bond is held by a body of trustees, described therein as acting under a will and a long set of codicils and deeds of assumption, and that the security-subjects consist of a tenement of shops and houses, the discharge may appropriately run in the following form—

We, A. B. and C., the testamentary trustees of D., in consideration of the sum of £1000 now paid to us by E., do hereby discharge a bond and disposition in security dated the 14th and recorded in the Division of the General Register of Sasines for the

county of Edinburgh on the 15th, both days of May 1890, for the sum of £1000 granted by the said *E.* in our favour, and all interest due thereon: And we declare to be redeemed and disburdened thereof, and of the infeftment following thereon, All and Whole that tenement Nos. 1, 2, and 3 King Street in the city and county of Edinburgh, with the *solum* thereof, ground attached, and pertinents, all as specified and described in the said bond and disposition in security dated and recorded as aforesaid.—In witness whereof.

The stamp duty on partial discharges requires attention. The rule under the Stamp Act, 1891 (Mortgage No. 5), is that the stamp on every partial discharge is 10s., whether the amount discharged be more or less than £2000, and that the final discharge is liable to 6d. per £100 on the full original sum, without deduction for the stamp on any previous partial discharge (*Munro*, 1895, 23 R. 232). But in practice, if the whole debt is under £2000, the stamps on partial discharges are limited to 6d. per £100 on the *total* original debt, thus making them the same, in that case, as the stamp on the final discharge. The law and practice are the same in the case of deeds of restriction: and the incorporating of a deed of restriction with a partial discharge does not increase the stamp.

On the following matters, reference is made to the undernoted passages in this work:—

Vol. ii. 172–4. Forms of discharge of personal bonds and bonds and assignations in security.

.. 177. Procedure when discharge of heritable security cannot be obtained.

.. 180. Competition between a *bonâ fide* assignee of a security and the proprietor who has paid the debt but has not recorded a discharge.

.. 180–1. Diligence against creditor as affecting validity of discharge.

.. 182. Completion of title.

.. 185. Discharge of personal obligation of original debtor, and transmission against new proprietor.

Vol. iii. 201. Whether proprietor can keep up debt by taking assignation instead of discharge. But, as to land tax, see the Finance Act, 1896 (ss. 33 and 36 (2)).

See BOND: BOND AND DISPOSITION IN SECURITY: BENEFICIUM CEDENDARUM ACTIONUM: CATHOLIC AND SECONDARY CREDITORS: CAUTIONARY OBLIGATIONS.

**Discharge in Bankruptcy.**—The two chief objects of a modern bankruptcy process are the distribution of the bankrupt's estate among his creditors, and the discharge of the bankrupt from the creditors' claims. Prior to the introduction of sequestration by the Act 12 Geo. III. c. 72, the law provided no means by which an insolvent debtor could obtain release from his debts except by payment of them in full. The process of *cessio bonorum* (as it existed down to 1880), while it offered the debtor protection from personal diligence, carried with it no relief from his creditors' rights against his estate. Under the existing Bankruptcy Acts, full provision is made for discharge of a sequestrated bankrupt in two modes, viz. either on dividend or on composition; while, under the Debtors Act, 1880, and the Bankruptcy and Cessio (Scotland) Act, 1881, provision has also been made for the discharge of a debtor in cessio. The main features only of the subject are referred to in the present article, and for fuller treatment of it reference must be made to the articles on SEQUESTRATION; CESSIO; TRUST DEED FOR CREDITORS.

## I. DISCHARGE IN SEQUESTRATION.

(A) *Discharge on Dividend*.—Subject to the conditions after mentioned, a sequestrated bankrupt is entitled to apply to the Lord Ordinary on the Bills or the Sheriff for discharge (1) at any time after the second statutory meeting (at which the bankrupt's examination takes place), provided all the creditors who have produced affidavits and claims concur; (2) on the expiration of six months from the date of the deliverance actually awarding sequestration, if a majority in number and four-fifths in value of such creditors concur; on the expiration of twelve months from said date, if a majority in number and two-thirds in value concur; on the expiration of eighteen months from said date, if a majority in number and value concur, and on the expiration of two years from said date, without any consents of creditors (19 & 20 Vict. c. 79, s. 146). Concurrences by creditors must be in writing (as, *e.g.*, by a duly authenticated minute of meeting at which the concurring creditors are present), and must bear reference to the report which the trustee is required to make as to the conduct of the bankrupt and his compliance with the Statute (*ib.*; *Scott*, 1872, 10 M. 626). This report is an essential preliminary to the petition (*ib.*; see Goudy on *Bankruptcy*, 393).

Under the provisions of the Bankruptcy and Cessio (Scotland) Act, 1881, a bankrupt is not at any time entitled to be discharged unless it is proved to the satisfaction of the Lord Ordinary or the Sheriff (1) that a dividend of not less than five shillings in the pound has been paid out of the estate of the bankrupt or secured to the satisfaction of the creditors, or (2) that the failure to pay this amount has, in the opinion of the Lord Ordinary or Sheriff, arisen from circumstances for which the bankrupt cannot justly be held responsible (44 & 45 Vict. c. 22, s. 6; see *Shand*, 1882, 19 S. L. R. 562; *Wilson & Co.*, 1882, 20 S. L. R. 17; *Clarke*, 1883, 11 R. 246; *Boyle*, 1885, 12 R. 1147; *Phillips*, 1885, 13 R. 91). In the second case, the onus of proof is on the bankrupt, and the Lord Ordinary or Sheriff may require him to lead, and may allow objecting creditors to lead, such proof as he may think right (44 & 45 Vict. c. 22, s. 6), or he may remit to the Accountant of Court to report (see *Clarke, supra*; *Boyle, supra*). In the event of a discharge being refused, the application may be renewed if, by additional payments by the bankrupt or from his estate, the creditors have received five shillings in the pound.

In addition to the requirements as to dividend above referred to, power is conferred on the Court or the Lord Ordinary or the Sheriff to refuse an application for discharge, although two years have elapsed from the date of the sequestration, and although no appearance or opposition is made by or on the part of any of the creditors, "if it shall appear from the report of the Accountant in Bankruptcy or other sufficient evidence, that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856" (23 & 24 Vict. c. 33, s. 3; see *Millar*, 1877, 5 R. 144).

Where the trustee or creditors oppose the application, the following classes of objections may, apart from the statutory requirements above mentioned, be pleaded in bar of the discharge: (1) Defects of procedure in the application (*How*, 1833, 12 S. 211; *Wylie & Lochcad*, 1859, 21 D. 577; *Scott*, 1872, 10 M. 626; cf. *Stirling Bank*, Bell, *Com.*, 5th ed., ii. 447 (note); *Finlay*, 1832, 7 F. C. 396). (2) Failure by the bankrupt to comply with the requirements of the Statute. (3) Fraudulent or collusive dealings by the bankrupt, as, *e.g.*, the embezzlement of funds or fraudulent disposal of

goods on the eve of bankruptcy (*Cunninghame*, 1822, 1 S. 143; *Findlay*, 1832, 10 S. 813; *Cooper*, 1872, 11 M. 38; *Millar*, 1877, 5 R. 144), or the entering into collusive agreements for facilitating discharge, such as are prohibited by sec. 150 of the Bankruptcy Act, 1856. (4) Extravagance or reckless trading (*McNellan*, 1856, 18 D. 488; *Gemmell*, 1853, 16 D. 264; *Dixon's Trs.*, 1867, 5 M. 767; *Learmonth*, 1858, 20 D. 418; see *Napier*, 1850, 13 D. 222).

It is not settled whether it is a good objection to discharge, that the bankrupt refuses to make available to the creditors funds or estate which from their nature do not vest in the trustee (see *Blaikie*, 1871, 10 M. 140; *Kirkland*, 1886, 13 R. 798; *Reid*, 1893, 20 R. 510).

Where appearance is made to oppose an application for discharge, the Lord Ordinary or Sheriff may "either find the bankrupt entitled to his discharge or refuse the discharge, or defer the consideration of the same for such period as he may think proper, and may annex such conditions thereto as the justice of the case may require" (19 & 20 Vict. c. 79, s. 146; see *Napier*, *supra*; *Learmonth*, *supra*; *Blaikie*, *supra*; *Buchanan*, 1882, 9 R. 621; *McCarter*, 1893, 20 R. 1090). But where the requirements of the Bankruptcy and Cessio Act as to dividend (see above) have not been satisfied, the Court has no discretion, and must refuse discharge.

If the bankrupt has been found entitled to his discharge, he must make a declaration, or, if required by the trustee or any creditor, an oath, before the Lord Ordinary or Sheriff, that he has made a full and fair surrender of his estate, and has not granted or promised a preference or security, nor made or promised any payment, nor entered into any secret or collusive transaction, to obtain the concurrence of any creditor to his discharge (19 & 20 Vict. c. 79, s. 147).

The deliverance awarding discharge releases the bankrupt "of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration" (19 & 20 Vict. c. 79, s. 147). Extracts of the deliverance are transmitted to the Accountant of Court, and also to the Keeper of the Register of Inhibitions and Adjudications for registration (*ib.*). It is enacted that the deliverance "shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland and all Her Majesty's other dominions" (*ib.*). It does not, however, extend to discharge the bankrupt with respect to any debt due to the Crown, or any debt or penalty with which he stands charged at the suit of the Crown, or any person for any offence committed against any Act or Acts relative to any branch of the public revenue, or at the suit of any Sheriff or other public officer upon any bail bond entered into for the appearance of any person prosecuted for any such offence, unless the Commissioners of the Treasury consent to such discharge (*ib.* s. 148). Where a creditor has an obligant bound to him along with the bankrupt, such obligant is not released by the bankrupt's discharge, or by the fact that the creditor assented thereto (*ib.* s. 56).

Discharge does not affect the bankrupt's liability for debts incurred after the date of the sequestration. There is, however, little or no authority on the subject of claims which have their foundation in obligation incurred prior to sequestration, but which at its date do not exist as more than remote possibilities incapable of estimation (see *Baird*, 1830, 8 S. 966, per *Ld. Glenlee*; *Tulloch*, 1847, 9 D. 582; *Garden*, 1860, 22 D. 1190). Thus, it is not settled how far liability for future calls in a joint stock company, so long as it is a solvent and going concern, falls to be

treated as a debt existing at the date of sequestration (see *Union Heritable Securities Association*, 1889, 16 R. 711). In England, it has been held that such liability is one capable of being estimated and ranked for (*Mercantile Mutual Marine Insurance Association*, 25 Ch. D. 415). In the case of alimentary debts, while arrears due at sequestration fall under the discharge (see *Marjoribanks*, 1831, 10 S. 79), it is a question how far a claim of aliment for the period after sequestration is affected thereby (see *Marjoribanks*, *supra*; *Downs*, 1886, 13 R. 1101; *Tulloch*, *supra*, per Ld. Cockburn).

Discharge of a bankrupt upon dividend does not have the effect of reinvesting him in his estate or terminating the sequestration. Property acquired by him after his discharge is free from all claims existing at the date of the sequestration and capable of being ranked for therein; but all property which belonged to him at the date of the sequestration, or which vested in him prior to the date of the discharge, remains subject to the sequestration, and is distributable among creditors claiming therein, unless it has been abandoned by them to the bankrupt (19 & 20 Vict. c. 79, s. 103; *Northern Herit. Secur. Invest. Co.*, 1886, 16 R. 100, and 18 R. (H. L.) 37; see ABANDONMENT IN BANKRUPTCY). The fact that the trustee, as well as the bankrupt, has been discharged, does not affect the creditors' right to such estate; and a new trustee may be appointed to ingather and distribute it (*Northern Herit. Secur. Invest. Co.*, *supra*). But where both the trustee and the bankrupt have been discharged, it has been decided that the bankrupt's radical title revives, to the effect of giving him a title to sue in regard to the sequestered estate, subject of course to the creditors' right to claim whatever may be thus recovered, unless the asset in question has been abandoned by them to the bankrupt (*Whyte*, 1888, 16 R. 95; *Geddes*, 1889, 17 R. 278; see *Cooper*, 1893, 20 R. 920).

All fraudulent transactions entered into for procuring discharge are struck at by the Bankruptcy Act, sec. 150 of which enacts that "all preferences, gratuities, securities, payments, or other consideration not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void: and if during the sequestration any creditor shall have obtained any such preference, gratuity, security, payment, or other consideration, or promise thereof, or entered into such secret or collusive consideration or transaction, the trustee shall be entitled to retain his dividend, and he or any creditor ranked on the estate may present a petition to the Lord Ordinary or to the Sheriff, praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration given, made, or promised; and if no cause be shown to the contrary, decree shall be pronounced accordingly, and the sums which in such case may be recovered shall, under deduction of the expenses of recovering the same, be distributed among the other creditors in the sequestration" (see *Carter*, 1869, 8 M. 64; *revd.* 9 M. (H. L.) 49). Provision is also made for recovering the amount of such preference, after a sequestration has been closed, by means of a multiplepoinding raised in the name of the recipient thereof at the instance of any creditor who has not received full payment (*ib.*; see *Murdoch*, 1864, 2 M. 515).

If the bankrupt has been personally concerned in or cognisant of the granting or promising of any preference, etc., as above mentioned, he forfeits all rights to a discharge, and all benefits under the Act: and a

discharge in his favour, if granted, must be annulled, the trustee or any creditor being entitled to petition the Court to this end (19 & 20 Vict. c. 79, s. 151; see *Inglis*, 1843, 5 D. 1029; *Brown*, 1846, 8 D. 822; *Pendreigh*, 1875, 2 R. 769).

The deliverance finding the bankrupt entitled to discharge, and that awarding discharge, may be appealed against within eight days if pronounced by the Sheriff, and within fourteen days if pronounced by the Lord Ordinary (19 & 20 Vict. c. 79, ss. 170, 171).

(B) *Discharge on Composition*.—After a composition contract has been arranged and approved of by the Court, the bankrupt emits a statutory declaration or oath before the Lord Ordinary or Sheriff, to the effect that he has made a full surrender of his estate, and has not granted any preference, etc., to procure the concurrence of creditors to the composition. Thereupon the Lord Ordinary or Sheriff pronounces a deliverance, discharging him of “all debts and obligations contracted by him, or for which he was liable at the date of the sequestration,” and declares the sequestration to be at an end, and the bankrupt reinvested in his estate (reserving always the claims of the creditors for the composition against the bankrupt and the cautioner). This deliverance may be appealed against, if pronounced by the Sheriff, within eight days, and if pronounced by the Lord Ordinary, within fourteen days from its date (*ib.* ss. 170, 171); and the right of appeal is not prejudiced by extract of the discharge within the appealing days (*Samson*, 1849, 11 D. 1208). Any creditor may appeal (*Scottish Provincial Assurance Co.*, 1859, 21 D. 333).

Unlike discharge on dividend, a discharge on composition has the effect of reinvesting the bankrupt in his estate, and thus terminating the sequestration (19 & 20 Vict. c. 79, s. 140; *Holmes*, 1829, 7 S. 535; see *Taylor*, 1889, 16 R. 711). No deed of retrocession is required to operate the reinvestiture. Pending actions at the instance of the trustee may be taken up by the bankrupt when he has been thus reinvested. (As to assets omitted to be given up in the state of affairs, see *Geddes*, 1889, 17 R. 278; *Baillie*, 1835, 13 S. 472; *Kerr*, 1876, 13 S. L. R. 480.) The bankrupt or his cautioner may also, by petition to the Lord Ordinary or Sheriff, call the trustee or his cautioner to account for his intrusions at any time, even after the trustee's discharge (19 & 20 Vict. c. 79, s. 142; *Burns*, 1869, 7 M. 476).

If the bankrupt have granted fraudulent preferences or securities reducible under the Bankruptcy Statutes, he does not become entitled to challenge these merely by virtue of the reinvestiture operated by discharge. As the right of challenge is not an incident of the bankrupt's estate, but a creditor's right, it must be expressly conferred by the creditors upon the bankrupt. He must stipulate for it in making his offer of composition, specifying the transactions which he desires to challenge, and giving notice in writing to the creditors interested: and he must obtain an assignation from the trustee of the rights of challenge vested in the creditors (*Bell, Com.*, 5th ed., ii. 458-9; 19 & 20 Vict. c. 79, s. 143; *Adam*, 1842, 5 D. 391; *Irving*, 1824, 3 S. 87).

As to the effect of discharge in regard to contingent obligations, Crown debts, and debts incurred after sequestration, reference may be made to what has been said above under discharge on dividend.

Payment of composition being, like payment of dividend, equivalent to payment of the debt, there can be no double ranking. Thus, where the principal debtor in an obligation pays a composition thereon to the creditor, a cautioner making good the balance of the debt has no claim for composition in respect of the amount so paid by him (*Bell, Com.*, 5th ed., ii. 442).

and 474). Where the holder of bills was ranked on the bankrupt estate of an endorser and received dividends, and thereafter obtained payment from the acceptor of the full amount due on the bills, it was held that the endorser, after being discharged on composition, was entitled to demand repayment of the amount above 20s. in the pound received by the creditor (*Patten*, 1853, 15 D. 617). Cautioners or co-obligants in debts due by the bankrupt are not released by the creditors accepting a composition, or consenting to the discharge of the bankrupt (19 & 20 Vict. c. 79, s. 56).

Discharge on composition does not affect the right of a secured creditor to have recourse against the subject of his security for the amount remaining due after payment of the composition. Privileged debts must, of course, be satisfied preferably to payment of composition on ordinary claims.

A discharge may be annulled on the following grounds: (1) Failure to observe the provisions of the Bankruptcy Acts in a material respect (*Milu*, 1845, 7 D. 888). (2) Preferences or payments or collusive agreements made or granted for the purpose of obtaining discharge (19 & 20 Vict. c. 79, ss. 150, 151). (3) Wilful misrepresentation to the creditors, inducing material error on their part in assenting to the composition (*Bell, Com.* ii. 360; *Stewart*, 1836, 14 S. 989; *Baillie*, 1837, 15 S. 893).

There is nothing illegal in a bankrupt, after discharge, paying or undertaking to pay any creditor's debt in full, provided that it is not done as the result of an illegal agreement prior to discharge (*Grimshaw*, 1842, 4 D. 1360; *Clark*, 1869, 7 M. 335; *Roy*, 1831, 9 S. 766; *Hunter*, 1835, 13 S. 390).

See SEQUESTRATION.

## II. DISCHARGE IN CESSIO.

Under the older law of cessio there was no means whereby a debtor could obtain discharge, save by payment of his debts in full. The Debtors Act, 1880, contained no provision on the subject; but under the Bankruptcy and Cessio Act, 1881 (44 & 45 Vict. c. 22), a debtor is now entitled to obtain a discharge on dividend, under conditions similar to those obtaining in sequestration. The periods at which he is entitled to apply to the Sheriff for this purpose, and the consents by creditors required, are the same as those prescribed by the 146th section of the Bankruptcy Act, 1856, the date of decree of cessio being substituted for the date of awarding sequestration, and the consents by creditors being sufficient if given in writing and produced with the application, without the necessity for convening a meeting of creditors with reference to the discharge (44 & 45 Vict. c. 22, s. 5; see *supra*). There is no provision for discharge on composition. The right to discharge is restricted by provisions as to paying or securing a dividend of five shillings in the pound to the creditors, similar to those in sequestration (44 & 45 Vict. c. 22, s. 7; see *supra*). By the discharge the debtor is finally released from all debts contracted by him before the date of the decree of cessio (s. 5). A deliverance by the Sheriff granting, postponing, or refusing a discharge is final and not subject to review.

## III. DISCHARGE UNDER TRUST DEED FOR CREDITORS.

It is common in trust deeds to stipulate for a discharge to the debtor, in consideration of the surrender of his whole estate to the creditors, and creditors who accede to the trust and receive their share of the estate will be bound by such a stipulation (*Bell, Com.* ii. 396; *Gibson*, 1824, 3 S. 263). But creditors who refuse to accede are not affected by it, and it cannot be

imposed upon them as a condition of their receiving dividends on an equal footing with the acceding creditors, for which they are entitled to sue the trustee should he refuse to pay (*Ogilvie*, 1887, 14 R. 399). In the absence of stipulation in the trust deed, the debtor has no right to a discharge, even from the acceding creditors.

See SEQUESTRATION; CESSIO; TRUST DEED FOR CREDITORS; COMPOSITION CONTRACT.

### **Discharge of Trustees, etc.**—See EXONERATION AND DISCHARGE.

**Disclamation.**—Any party to an action whose name has been used without authority may disclaim responsibility by minute, followed by a motion to have the minute sustained by the Court. As to liability for expenses prior to the date of lodging the minute, Mr. Mackay states that, until the minute has been lodged, “the party appearing by counsel remains liable for expenses, for counsel has a presumed mandate to appear for a party whom he has been instructed by a qualified agent to represent, and the only remedy is an action of damages against the agent who instructed the counsel” (Mackay, *Manual*, p. 286). He bases this statement upon the case of *Thomson* (1855, 17 D. 774). This case is, however, reported very briefly, and cannot be regarded as a satisfactory exposition of the practice. On the other hand, the whole question was gone into by the Court in the case of *Cowan v. Farnie* (1836, 14 S. 634). In that case Ld. Mackenzie observes: “Are we to say that the gown of a counsel does of itself so unqualifiedly imply a mandate to appear, that the party in whose name he appears will be firmly bound to anything which is formally decreed in a process to which the counsel has duly sided him? Or are we to hold, on the other hand, that the implied mandate of the gown is worth nothing, and that a party may simply disclaim it at any time? I do not incline to go to either extreme. And I have no hesitation in saying that I reject the doctrine that the implied mandate of the gown is indefeasible, and cannot be redargued. I do not carry the doctrine further than this, that the gown presumes a mandate, and it lays the onus on the party disclaiming it to prove that he gave no mandate.” If this be the true view of the practice, then, in the event of a party disclaiming at the bar, the judge will, if satisfied that the party disclaiming gave no authority, decree against the agent who used his name for the expenses of the action up to the date of the disclamation. Before the opposite party can get decree for expenses against the agent, it must be proved that the agent acted without authority. What is sufficient proof of authority is a matter for the judge. The fact that the agent was unable to produce a written mandate has been held sufficient evidence (*Philp*, 1848, 11 D. 175). If a party has given a general mandate to carry on actions in his name, he cannot disclaim on the ground that he gave no special mandate to carry on a particular action (*Pitcairn*, 1834, 12 S. 769). [Mackay, *Manual*, pp. 286, 287; *Practice*, vol. ii. p. 543; Coldstream, p. 110.]

**Discussion.**—By the common law of Scotland, following the Roman law (see BENEFICIUM ORDINIS), cautioners bound in a proper cautionary obligation have the benefit of discussion, that is, are entitled to



demand that the creditor, before proceeding against them, should "discuss" the principal debtor. By "discussing" the principal debtor is meant not merely that the creditor should demand payment from him, but that he should do his best to enforce such payment. He must proceed to do diligence both against the debtor's person and against his estate (Stair, i. 17. 4 and 5; Ersk. *Inst.* iii. 3. 61; Bell, *Prin.* ss. 252-3). The necessity for discussing the debtor was obviated by his bankruptcy (*Galloway*, 1825, 4 S. (N. E.) 134); or by his being absent from the country, leaving no property behind him (*Elams*, 1757, Mor. 2110). The fact that the principal debtor was dead did not exempt the creditor from discussing his heirs and estate (*Wishart*, 1835 13 S. 769; revd. 1837, 2 S. & M.L. 564).

The Mercantile Law Amendment Act (19 & 20 Vict. c. 60, s. 8) provides that: "Where any person shall become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them which is competent according to the law of Scotland; provided always that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor."

This enactment does not make a cautioner liable unless the principal debtor has failed to perform his obligation. Before liability can accrue to a cautioner, there must in every case be something to show default on the part of the principal debtor,—as, for example, in the case of a debt payable on demand, something in the way of demand on the principal debtor, or, in the case of a debt payable on a fixed date, the expiry of the period of payment without payment having been made. Accordingly, decree can never pass against a cautioner till it is established that a liability attaches to the principal (*Ross*, 1834, 12 S. 427); or that the creditor has sustained loss through the principal's default (*Wright*, 1827, 5 S. 311; *Dick*, 1870, 8 S. L. R. 334). Sec. 8 of the Mercantile Law Amendment Act plainly applies only to cautioners for a money debt. In an obligation *ad factum præstandum*, it is clear that, since the principal alone can perform the fact, no claim can arise against the cautioner until the principal debtor has failed, and this failure has been proved by the creditor.

In virtue of the enactment, the creditor in any form of cautionary obligation, immediately upon the default of the principal, may now proceed directly against the cautioner without being bound first to do diligence against the principal, or even to constitute the debt against him in a separate action (cf. per L. J. C. Moncreiff in *Morrison*, 1870, 9 M. 35). Where the ground of debt is not liquid, the most expedient course, in the ordinary case, is for the creditor to make both the principal debtor and the cautioner parties to the action of constitution. When the debt is constituted against the principal debtor, this usually suffices to fix the liability of the cautioner; for in taking objection to the validity of the obligation, the cautioner cannot stand in a better position than the principal debtor (Stair, i. 17. 9; *United Mutual and Mining Assur. Co.*, 1860, 23 D. 69). If, however, the cautioner is not called in the action of constitution, and everything is done behind his back, he is entitled to see that no material defence has been omitted, that everything has been done regularly, and that there is

a valid decree against him (*Mackenzie*, 1842, 15 Sc. Jur. 34; *Ross*, 25 June 1840, F. C.). Further, in the accounting or other proceedings by which the extent of the cautioner's liability is determined, there is no privity of contract between him and the principal debtor. "In an action against the surety, the amount of damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due, and which alone the surety was liable to pay" (per James, L. J., in *Ex parte Young, In re Kitchin*, 1881, 17 Ch. Div. 668 at 671). The cautioner, in short, is entitled to have the liability proved as against him in the same way as against the principal debtor.

See BENEFICIUM ORDINIS; CAUTIONARY OBLIGATIONS.

**Disentail.**—See ENTAIL.

**Disjoining Actions.**—See CONJOINING OF ACTIONS.

**Disjunction and Annexation.**—This is the process by which certain lands are disjoined from one parish and annexed to another existing parish. This is effected by the Court of Teinds, under the powers conferred upon it by the Act 1707, c. 9. The consent of the heritors is not required, as it is in the case of disjunction and erection of a new parish (*Baird*, 1893, 20 R. 973). The annexation may be either *quoad omnia* or *quoad sacra tantum*. In the former case, the lands are incorporated with the parish to which they are annexed for all purposes, civil as well as sacred, just as if they had always belonged to it. In the latter case, the change is for spiritual purposes only, and civil rights and liabilities are not affected. Even where the annexation is *quoad omnia* the Court may modify its effect by certain provisions in the decree, as, for example, that the stipend from the teinds of the lands dealt with is to remain payable to the minister of the original parish. In view of the recent revision of the boundaries of civil parishes by the Boundary Commissioners acting under the Local Government Act of 1889, and of the powers conferred by the Act upon the Secretary for Scotland hereafter to modify boundaries, it is unlikely that the Court of Teinds will be resorted to in future for disjunction and annexation *quoad omnia*. On the other hand, advantage may be taken of the powers of the Court of Teinds to assimilate the boundaries of parishes *quoad sacra* to the new civil boundaries under the Local Government Act, for the alterations effected by that Act do not alter any right to, or affecting, teinds, or any ecclesiastical arrangements or jurisdictions.

Questions have arisen with reference to the effect of disjunction and annexation *quoad sacra tantum*. Upon matters of civil administration, such as the poor law, it has no effect; but some difficulties have arisen in regard to matters of mixed ecclesiastical and civil right. The minister of the parish to which the lands originally belonged continues to draw his stipend from the lands (*McDonald*, 1836, 9 Jur. 8). The heritors of these lands are not liable for the maintenance of the manse of the new parish.

The question whether heritors of lands annexed *quoad sacra* are liable for the repair or rebuilding of the church of the lands to which the parish has been annexed is an open and difficult one. One affirmative decision (*Drummond*, 1773, Mor. 7920) has been often questioned (*N. E.*

*Rugby Co.*, 1864, 2 M. 537; *Roxburgh*, 1876, 3 R. 728; and *Fortrose*, 1880, 8 R. 124). In any view, heritors of such lands appear to be liable for all the burdens of the old parish of a category for which they are not liable in the new (per *Ld. Curriehill* in *Fortrose*, *supra*). (Connell on *Parishes*; *Duncan, Parochial Ecclesiastical Law*; *Black, Parochial Ecclesiastical Law*.)

**Disjunction and Erection.**—This is the name of the procedure adopted where the lands disjoined from one parish are not annexed to an existing parish, but are erected into a new parish. Such erection may be either *quoad omnia* or *quoad sacra tantum*.

(1) *Erection quoad omnia*.—A new parish may be formed out of lands taken from one or more existing parishes. This is effected by the Court of Teinds under statutory powers (1707, c. 9, and 7 & 8 Vict. c. 44). All the parochial rights and burdens are transferred from the old parish to the new along with the lands, except so far as the decree may be in any way qualified. It is sometimes so qualified in regard to the teinds, the minister of the old parish being allowed to continue to draw from the new parish so much of stipend as was in use to be drawn from the disjoined lands. In such a case the minister of the new parish can draw stipend from the teinds only so far as the modification in favour of the minister of the original parish will permit (*Abbotshall*, 22 Nov. 1815, F. C.). The decree may also be qualified as regards the transfer of any branch of parochial administration, as, for example, the case of the poor. Under the 1707 Act the consent of three-fourths in value of the heritors of the whole parish was necessary to a disjunction and erection; but by the 1844 Act it was provided (s. 1) that a bare majority in value would suffice. Even this consent may be dispensed with (s. 4) if already there be in the lands about to be disjoined a church or place of worship suitable for the church of the new parish, and capable of being lawfully appropriated to that purpose, the heritors being thus saved the expense of erecting a new church; and if the titulars or others having right to the teinds, out of which is to be paid not less than three-fourths of the additional stipend or stipends to be modified in consequence of the disjunction, have consented to it, or have offered no objection after due intimation by direction of the Court to them. The titulars are *in titulo* to object, although there may be the necessary consent of heritors (*Calder*, 1743, Connell, *Parishes*, 78. See also, as to grounds of objection, *Campbell*, 1864, 3 M. 295). The area of the church of the new parish is divided in the ordinary way among the heritors of the new parish on whom the burden of maintaining the fabric of the church devolves (*Reid*, 1850, 12 D. 1211).

(2) *Erection quoad sacra*.—The cases of disjunction and erection which now occur in practice are in connection with the creation of *quoad sacra* parishes under the Act 7 & 8 Vict. c. 44, s. 7. By that section it is provided that, on the application of persons who have built and endowed, or undertaken to build and endow, a church, the Court of Teinds may erect the church into a parish church, and may attach a district thereto as a parish *quoad sacra*, the minister and elders of which shall have all the status and rights of a parish minister and elders of the Church of Scotland. The titles must be taken so as to secure the fabric of the church to the Church of Scotland, and provision must be made for the upkeep of the same. The endowment must not be less than £120 per annum, or £100 with a manse. Provision is made by the next section for the appropriation of certain of the sittings for behoof of the poor, and power is given for the

letting of the remainder, and the application of the proceeds for the purposes of the church.

The form of application is by petition, and an order for intimation is first made. This usually includes (1) intimation from the pulpits or precentors' desks of the churches and parishes affected, (2) *Gazette* and newspaper notice, and (3) copies to the session clerk or session clerks of parish or parishes affected, and the minister of the chapel; (4) intimation to town clerk where the parish is burghal. Thereafter there are lodged evidence of intimation, a minute of the presbytery approving of the erection, and a map of the proposed district. The Court remit to the Clerk to examine these, and also to report upon the title and the securities. If the Clerk reports that these are all in order, decree is generally then granted *de plano*. Since the passing of the Act, the Court have only refused some four or five out of some 400 applications, and several of these only on technical grounds. The cases are more numerous where questions have arisen with regard to the boundaries of parishes proposed to be erected, but even these are now of very rare occurrence. The nature of the parish which is the result of a process of disjunction and erection *quoad sacra*, and the effect of this process upon ecclesiastical rights and liabilities, will be considered under the head of PARISH QUOAD SACRA. Such erection has no effect as regards matters of civil administration.

[Elliot on *The Erection of Parishes quoad Sacra*; Black, *Parochial Ecclesiastical Law*; Duncan, *Parochial Ecclesiastical Law*; Connell on *Parishes*.]

### **Dismissal.**—See DECREE.

**Dismissal (Sheriff Court).**—Where all parties to a defended action fail to appear, either by themselves or by their agents, at a diet of proof, diet of debate, or other diet in the cause, the Sheriff must, unless a sufficient reason appear to the contrary, dismiss the action (39 & 40 Vict. c. 70, s. 20). See DECREE.

**Dismissal from Her Majesty's Forces.**—An officer in the army or militia, and an officer in the yeomanry or volunteers, when subject to military law, may be sentenced to be cashiered or dismissed from Her Majesty's service by sentence of a general court-martial (Army Act, 1881, 44 & 45 Vict. c. 58, s. 44, *d, e*); and an officer, before he is sentenced to penal servitude or imprisonment, must be cashiered (s. 44 (2)). Officers in the yeomanry and volunteers are subject to military law whenever the men actually under their command are so subject, or their corps is on actual military service; and also whenever they are doing duty, apart from their corps, with any body of troops (whether regular or auxiliary) who are so subject (s. 175 (5) (6)). A warrant officer not holding an honorary commission may be sentenced to dismissal by a district or general court-martial (s. 182). An army schoolmaster may be sentenced to dismissal by a district or general court-martial, by the commander-in-chief, and in India by the commander-in-chief of the forces in India (s. 183).

A soldier may be discharged with ignominy from Her Majesty's service by sentence of a district or general court-martial (ss. 44 (*b*), 47 (5)); and a soldier, when sentenced to penal servitude or imprisonment, may, in addition thereto, be sentenced to be discharged with ignominy from Her

Majesty's service (s. 44 (4)); men in the reserve forces and militia when called out for service, and in the yeomanry and volunteers when subject to military law, are liable to a similar punishment by sentence of court-martial; but, on the trial of a person belonging to the auxiliary forces, one member of the Court shall, if practicable, belong to those forces and to the same branch as that to which the prisoner belongs (s. 50 (1)); Rule 20 (B). Sec. 181 (6) specially provides that "where a member of the volunteers, being a non-commissioned officer or private, is subject to military law, dismissal may be awarded as a punishment in the event of his committing any offence triable by court-martial or punishable by a commanding officer under this Act." Non-commissioned officers and men of the yeomanry are subject to military law when they or their corps are being trained or exercised, either alone or with any portion of regular forces, or with any portion of the militia when subject to military law; when they are attached to or otherwise acting as part of or with any regular forces: when their corps is on actual military service and when serving in aid of the civil power. Non-commissioned officers and men of the volunteers are subject to military law when on actual military service: when being trained or exercised with any portion of the regulars, or militia, when subject to military law; and when attached to or otherwise acting as part of any of the regular forces; but, except when on actual military service, the commanding officer must give notice to volunteers about to enter upon any service which will render them subject to military law, that they will become so subject, and must give them an opportunity of abstaining from such service (s. 176 (8)). Volunteers, when not under military law, may also be dismissed by their commanding officer (26 & 27 Vict. c. 65, s. 21).

Any person who, having been discharged with disgrace from any part of Her Majesty's forces, *i.e.* discharged with ignominy, discharged as incorrigible and worthless, or discharged on account of a conviction for felony, or of a sentence of penal servitude, or having been dismissed with disgrace from the navy, has afterwards enlisted in the regular forces or militia, without declaring the circumstances of his discharge or dismissal, is, on conviction by court-martial, liable to imprisonment (Army Act, s. 32: Army Annual Act, 1884 (47 & 48 Vict. c. 8, s. 4); and, in the case of enlistment in the militia, may also be convicted by a Court of summary jurisdiction, and sentenced to imprisonment, with or without hard labour, for any term not less than two months and not more than six months (45 & 46 Vict. c. 49, s. 10).

In the *navy* the sentences of "dismissal with disgrace from Her Majesty's service" and "dismissal from Her Majesty's service" may be awarded by a court-martial (29 & 30 Vict. c. 109, ss. 52, 56): and the punishment of penal servitude shall in all cases involve dismissal with disgrace from Her Majesty's service (s. 53 (5)).—[See *Manual of Military Law* (War Office, 1894); Pratt, *Military Law*: Tovey, *id.*: Thring, *Criminal Law of the Navy*.]

See ARMY: COMMISSION: COURT-MARTIAL: ENLISTMENT: MILITIA: VOLUNTEERS: YEOMANRY.

**Dismissal from Service** —See MASTER AND SERVANT.

**Disorderly House.**—There are traces in the books of penalties at common law for keeping houses for immoral purposes. During the

century subsequent to the Reformation, women convicted of keeping such houses were dealt with summarily by magistrates, and also in some places by kirk sessions, and were punished with ducking, whipping, banishment from the town, and other indignities. But any proceedings which may be taken in the present day will no doubt be under modern statutory powers. The earlier Statutes of the Imperial Parliament, 25 Geo. II. c. 36, and 58 Geo. III. c. 70, do not apply to Scotland.

By the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112, s. 11), it is an offence for any person who occupies or keeps a brothel, to knowingly (a) harbour thieves or reputed thieves therein; (b) suffer thieves or reputed thieves to meet or assemble therein; (c) allow the deposit of goods therein, having a reasonable cause for believing them to be stolen. The penalty is a fine not exceeding £10, with imprisonment not exceeding two months in default of payment. Caution may also be required.

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), contains certain provisions against the keeping of brothels. It is (1) (s. 2) a crime and offence for any person to procure or attempt to procure any woman or girl (a) to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; (b) to leave her usual place of abode in the United Kingdom, such place not being a brothel, with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions. (2) (s. 8) A crime and offence for any person to detain any woman or girl against her will in any brothel, by withholding her clothes or otherwise. (3) (s. 13) An offence for any person (a) to keep or manage, or aid or assist in the management, of a brothel; (b) being the tenant, lessee, or occupier of any premises, to knowingly permit such premises or any part thereof to be used as a brothel, or for the purposes of habitual prostitution; (c) being the lessor or landlord, or the agent of the lessor or landlord, of any premises, to let the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or to be wilfully a party to the continued use of such premises or any part thereof as a brothel.

The penalties are as follows: For (1) and (2), two years' imprisonment; and for (3), a fine not exceeding £20, or, in the discretion of the Court, three months' imprisonment without option for a first offence, £40 or four months for a second offence, and the same plus caution for twelve months, or three months' imprisonment more, for a third or subsequent offence.

In construing these provisions, it has been held that a house where *one* woman receives men for the purposes of prostitution is not a brothel (*Singleton*, 1895, 1 Q. B. D. 607). On the other hand, under a local Act which imposed a penalty upon the occupier of any building which he uses or knowingly suffers to be used for the purpose of harbouring prostitutes for the purpose of prostitution, a conviction was sustained where the keeper of the house was a prostitute, and one other prostitute had been harboured (*Milton*, 1882, 10 R. (Jus.) 20; 5 Couper, 165).

Under the Criminal Law Amendment Act, the jurisdiction to try such offences is in the Sheriff, or, in regard to the more serious cases, also in the Court of Justiciary; but by the Burgh Police Act, 1892 (55 & 56 Vict. c. 55, s. 431), jurisdiction, under the Criminal Law Amendment Act, 1885, in so far as it relates to the suppression of brothels, is extended to Police Courts in burghs.

The same Act contains further provisions for the suppression of brothels. A power of granting search-warrants is (s. 403) conferred upon

magistrates, and any person convicted of either being the occupier of, or managing or assisting in managing, a brothel, is liable to a penalty not exceeding £20 or sixty days, or imprisonment not exceeding sixty days without option. Such a conviction *ipso facto* terminates any lease of the premises, without prejudice to the landlord's claim for rent.

**Disparagement.**—See SUPERIORITY.

**Dispensation, Clause of.**—See UNION, CHARTER OF.

**Disposition.**—When a fee of feudal subjects has been created, the proprietor, who is duly infeft therein, transmits his right of property to another by a deed called a disposition. As will be shown in the article FEU-CHARTER, the feu-charter, feu-contract, or feu-disposition is used to create a new fee; but the object of the disposition is to transmit a fee already duly constituted, from the proprietor thereof to another.

The transmission of subjects held burgage having been dealt with in the article on BURGAGE, it is proposed to deal with the subject of the transmissions of fees of subjects held feu under the following heads:—

- I. DISPOSITION OF PROPERTY OF SUBJECTS HELD FEU.
- II. DISPOSITION OF SUPERIORITY TO STRANGER OR TO VASSAL.
- III. DISPOSITION OF PROPERTY TO SUPERIOR.
- IV. ASSIGNATIONS OF PERSONAL TITLES; OF PERSONAL RIGHTS, IN THE SENSE OF SEC. 9 OF THE CONVEYANCING ACT, 1874; AND OF JURA CREDITI TO LANDS.

- I. DISPOSITION OF PROPERTY OF SUBJECTS HELD FEU, AND COMPLETION OF DISPONEE'S TITLE, PRIOR TO AND AFTER THE COMMENCEMENT OF THE CONVEYANCING ACT, 1874.

#### 1. *Form of Disposition prior to the Conveyancing Act, 1874.*

The steps taken prior to the commencement of the Conveyancing Act, 1874, for duly transmitting the *dominium utile* of subjects held feu from a proprietor, whose title was complete, to another, were these: (*a*) a disposition; (*b*) infeftment thereon; and (*c*) a charter or writ of confirmation granted by the superior: or, alternatively, these: (*a*) a disposition; (*b*) a charter or writ of resignation by the superior; and (*c*) infeftment. If the steps first enumerated were taken on behalf of the disponee, his title was said to be completed by confirmation; and if the steps second enumerated were followed, his title was said to be completed by resignation. Whether the title was completed by confirmation or by resignation, the intervention of the superior was an essential according to the law as it stood before the commencement of the Conveyancing Act, 1874; but such intervention was rendered unnecessary by this Act, which, among other things, provides that infeftment implies entry with the superior, and which renders it incompetent for superiors to grant charters or writs either of confirmation or of resignation. The result is, that since 1874 a disponee under a disposition requires, in order to complete his title, to follow the same method which a disponee under a feu-charter adopts in taking infeftment.

The disposition before 1845 ran thus :

- Clause I.—  
Narrative  
Clause. I, A., heritable proprietor of the lands and others after mentioned, in consideration of the sum of £                    sterling, instantly paid to me by B. as the price and value of the said lands and others, of which I discharge the said B. and his heirs and successors for ever, have sold, and do hereby sell, alienate, and dispoise to the said B., his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [here describe the subjects conveyed], together with all right, title, and interest which I or my predecessors and authors had, have, or can any way claim or pretend thereto, in all time coming : In which lands and others above disposed, I hereby bind and oblige myself and my foresaids to infest and seise the said B. and his foresaids, upon their own charges and expenses, and that by two several infeftments and manners of holding ; one thereof to be holden of me and my foresaids in free blench, for payment of a penny Scots in name of blench-farm, at Whitsunday yearly, upon the ground of the said lands, if asked only, and freeing and relieving us of all feu-duties, and other duties and services exigible out of the said lands and others by our superiors thereof ; and the other of the said infeftments to be holden from me and my foresaids, of and under our said superiors, in the same manner that I, my predecessors and authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other : And for completing the said infeftment by resignation, I hereby make and constitute                   , and each of them, jointly and severally, my lawful and irrevocable procurators, with full power to them to compare before my superiors of the lands and others above disposed, or their commissioners in their names, having power to receive resignations, and to grant new infeftments thereupon, and there for me and in my name to resign and surrender, as I by these presents resign, surrender, *simpliciter* upgive, overgive, and deliver, All and Whole the lands and others before disposed, all lying and described as aforesaid, and here holden as repeated *brevitatis causa*, with all right, title, and interest which I, my predecessors and authors, had, have, or could pretend thereto, in the hands of my said superiors, or their commissioners authorised as aforesaid, in favour and for new infeftment of the same to be made and granted to the said B. and his foresaids, heritably and irredeemably, in due and competent form ; acts, instruments, and documents thereupon to ask and take, and generally to do everything concerning the premises which I could have done myself, or which to the office of procuratory in such cases is known to belong ; ratifying hereby, and confirming whatever my said procurators shall lawfully do or cause to be done in the premises in virtue hereof : Which lands and others above disposed, with this disposition of the same, and infeftment to follow hereon, I bind and oblige myself and my foresaids to warrant to the said B. and his foresaids at all hands and against all mortals : And further, I hereby assign to the said B. and his foresaids, not only the whole writs, titles, and securities of the said lands and others, made and granted in favour of me, or my predecessors and authors, and whole clauses therein contained, with all that has followed or may be competent to follow thereon for ever ; But also the rents and duties of the said lands and others, due and payable for and furth thereof, for crop and year 18   , and for all crops and years thereafter ; surrogating hereby, and substituting the said B. and his foresaids in my full right and place of the premises for ever : Which assignation above written I bind and oblige myself and my heirs and successors to warrant as follows, viz., in so far as concerns the writs and evidents, at all hands and against all mortals ; and in so far as concerns the rents and duties, from my own proper facts and deeds only : And further, I hereby oblige myself, my heirs, and successors, to free and relieve the said B. and his foresaids of all feu-duties, cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others, at and preceding the term of                    which is hereby declared the term of the said B.'s entry to the premises in virtue hereof, the said B. and his foresaids being bound to free and relieve me and my foresaids of the same thereafter, in all time coming : And I have herewith delivered up to the said B. the title deeds of the said lands and others, conform to inventory subscribed by me of this date, as relative
- Clause II.—  
Dispositive  
Clause.
- Clause III.—  
Obligation to  
infest, and  
manner of  
holding.
- Clause IV.—  
Procuratory of  
Resignation.
- Clause V.—  
Clause of  
Warrandice.
- Clause VI.—  
Assignation to  
writs and rents.
- Clause VII.—  
Clause of  
Warrandice of  
preceding  
Assignation
- Clause VIII.—  
Obligation to  
free subjects  
of public  
burdens.
- Clause IX.—  
Clause of  
delivery of  
titles.



hereto : And I consent to the registration hereof in the Books of Council and Session, or others competent, for preservation ; and that all necessary execution may pass on a decree to be interponed hereto in common form ;

And for that purpose, I constitute

my procurators, etc. : Moreover, I hereby desire and require you

and each of you, my bailies in that part hereby specially constituted, that upon sight hereof ye pass to the ground of the said lands, and there give and deliver to the said *B.* or his foresaids

heritable state and sasine, with real, actual, and corporal possession of All and Whole the lands and others above disposed, lying and described as aforesaid, and here held as repeated *brevitatis causa*, and that by delivery to the said *B.* or his foresaids, or to his or their attorney or attornies in his or their name, bearers hereof, of earth and stone of the ground of the said lands, and all other symbols usual and necessary ; and this in nowise ye leave undone : Which to do, I commit to you, jointly and severally, full power by this my precept of sasine, directed to you for that effect.—

In witness whereof, these presents, written on this and the

preceding pages of stamped paper, by *X.*, clerk to *Y.*, are subscribed by me at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight hundred and \_\_\_\_\_ years, before these witnesses, *M.* and *N.*

(See *Jurid. Styles*, 4th ed., vol. i. 95.)

For the proper understanding of the import of the disposition, as well as the infetment on it, it will be necessary to deal at some length in this article with the obligation to infet, the procuratory or clause of resignation, and the precept of sasine. Before doing so, however, the alterations made on the form of the disposition by successive enactments prior to 1874 may be noticed.

By the Infetment Act, 1845 (8 & 9 Vict. c. 35, s. 5), a short form of the precept of sasine was introduced, which it was optional to use in place of the older and longer form.

By the Lands Transference Act, 1847 (10 & 11 Vict. c. 48, s. 1, and Sched. (A) ), statutory forms of these clauses were introduced: (1) clause declaring the term of entry: (2) a clause of obligation to infet: (3) clause of resignation: (4) a clause of assignation of writs: (5) a clause of assignation of rents: (6) a clause of obligation to free and relieve of feuduties and casualties due to the superior, and of public burdens: (7) a clause of warrandice: (8) a clause of registration for preservation, or for preservation and execution; and the Act sanctioned of new (9) a precept of sasine, in the form introduced by the Act of 1845. These forms, the use of which was not imperative, were declared as operative to all intents as if they had been expressed in the fuller form then generally in use. Further, the Act of 1847 made it competent, in cases where lands were held under any real burdens, conditions, or limitations appointed to be inserted in the investiture, to omit the full mention of them if they were referred to as set forth at full length in the recorded instrument, whether of sasine or of resignation *ad remanentiam*, wherein the same were first inserted, or in any recorded instrument of sasine of subsequent date forming part of the progress of titles of the lands, the reference being in the form of Schedule (C) of the Act (s. 5).

In consequence of the provisions of the Lands Transference Act, 1847, the disposition thereafter took this form :—

I, *A.*, heritable proprietor of the lands and others hereinafter disposed, in consideration of the sum of £ \_\_\_\_\_ instantly paid to me by *B.*, as the price thereof, and of which I discharge the said *B.*, have sold and hereby sell, alienate, and dispose to the said *B.*, his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [here describe the subjects conveyed].

Clause I.—  
Narrative Clause.

Clause II.—  
Dispositive Clause.

Clause III.—  
Term of entry.

Clause IV.—  
Obligation to infett.

Clause V.—  
Clause of resignation.

Clause VI.—  
Assignment of writs.

Clause VII.—  
Assignment of rents.

Clause VIII.—  
Obligations to relieve of  
public burdens.

Clause IX.—Warrandice.

Clause X.—Registration.

Clause XI.—  
Precept of Sasine.

Clause XII.—  
Testing Clause.

(See *Jurid. Styles*, 4th ed., vol. i., 97.)

In addition to giving the import of the clause of the obligation to infett (s. 2, and see *infra*), and of the clause of resignation introduced by it (s. 3, and see *infra*), the Act of 1847 declared, of the other clauses introduced by it, that the clause of assignment of writs and evidents, unless specially qualified, should be held to import an absolute and unconditional assignment to such writs and evidents, and to all open procuratories and precepts therein contained, to which the disposer had right (s. 3); that the clause of assignment of rents, unless specially qualified, should be held to import assignment to the rents to become due for the possession following the term of entry according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it should be held to import an assignment to the rents payable at the conventional terms subsequent to the date of entry (s. 3); that the clause of warrandice, unless specially qualified, should be held to imply absolute warrandice as regards the lands, and writs and evidents, and warrandice from fact and deed as regards the rents (s. 3): that the obligation to free from feu-duties, casualties, and public burdens, unless specially qualified, should be held to import an obligation to relieve of all feu-duties or other duties and services or casualties payable to the superior, and of all public, parochial, and local burdens due from or on account of the lands prior to the date of entry (s. 3); and that the clause of consent to registration, unless specially qualified, should import a consent to registration, and a procuratory of registration in the Books of Council and Session, or other judges' books competent, therein to remain for preservation, and also, if for execution, that letters of horning and all necessary execution should pass thereon upon six days' charge, on a decree to be interponed thereto in common form (s. 3).

By the Titles to Land Act, 1858 (21 & 22 Viet. c. 76),—which specially enacted (s. 20) that nothing contained in it should prevent the constitution, transmission, or completion of land-rights by the forms in use prior to the passing of the Act,—provided (1) that, immediately before the testing clause of any conveyance it should be competent to insert a clause of direction in

and my whole right, title, and interest, present and future, therein, [*If the subjects are to be holden under any peculiar burdens or restrictions not already constituted, these will be here inserted; or if already constituted, they may be referred to thus,—*“with and under the real burdens, restrictions, provisions, and obligations specified in an instrument of sasine in favour of C., recorded in the Register of Sasines at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_”] with entry at the term of \_\_\_\_\_: And I oblige myself to infett the said B. and his fore-saids to be holden *a me vel de me*: And I resign the said lands and others for new infettment (*if there are burdens, etc., say,* “with and under the real burdens, restrictions, provisions, and obligations before mentioned,” or “before referred to,” *as the case may be*): And I assign the writs, and have delivered the same according to inventory (*or otherwise, as the case may be*): And I assign the rents, and I bind myself to free and relieve the said B. and his fore-saids of all feu-duties, casualties, and public burdens: And I grant warrandice: And I consent to registration hereof for preservation: Moreover, I desire any notary public to whom these presents may be presented, to give to the said B. or his fore-saids sasine of the lands and others above disposed (*if there are burdens, etc., say,* “but always with and under the real burdens, restrictions, provisions, and obligations before mentioned,” or “before referred to,” *as the case may be*).—In witness whereof, etc. [*add a testing clause in legal form*].

the form of Sched. (C) annexed to the Act, specifying the part or parts of the conveyance which the grantor desired to be recorded in the Register of Sasines (s. 3); (2) that it should not be necessary to insert in any conveyance a clause of obligation to infeft, or a precept of sasine or warrant for infeftment (s. 5); (3) that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam* (s. 5); (4) that where lands had been particularly described in any prior conveyance or other writ, duly recorded in the appropriate Register of Sasines, they could be described in whole or in part, in any subsequent conveyance, by specifying the leading name or names, or other short distinctive description of the lands conveyed, and the name of the county and parish, or supposed parish, and referring to the particular description contained in the prior conveyance, or other writ so recorded in the form of Sched. (L), No. 1 (s. 15); and (5) that, where several lands were comprehended in one conveyance in favour of the same person or persons, it should be competent to insert a clause in the conveyance declaring that the whole lands conveyed, and therein particularly described, should be designed and known in future by one general name to be therein specified, and allowed reference to be made thereto in subsequent conveyances, the clause of reference being in the terms of Sched. (L), No. 2, annexed to the Act (s. 16).

Sec. 15 of the Act of 1858 was repealed by sec. 34 of the Titles to Land Act, 1860 (23 & 24 Viet. c. 143): and the latter Act enacted that where any lands held or not held burgage had been particularly described in any prior conveyance, discharge, or other deed or instrument duly recorded in the appropriate Register of Sasines, it should be competent to describe the lands in whole or in part by specifying the name of the county, and where the lands were held burgage the name of the burgh and county, in which they were situated, and referring to the particular description contained in such prior conveyance, or other deed or instrument so recorded, the reference being in the form of Sched. (H), No. 1, of the Act.

The Titles to Land Consolidation Act, 1868 (31 & 32 Viet. c. 101), repealed *in toto* the Lands Transference Act, 1847, and the Titles to Land Acts, 1858 and 1860 (s. 4), but re-enacted, with variations, the provisions of these Acts so far as the form of the disposition is concerned. By sec. 5 of the Act of 1868, it is enacted that it shall not be necessary to insert in any conveyance of lands in Scotland not held by burgage tenure (*a*) a clause of obligation to infeft, or (*b*) a precept of sasine, or (*c*) a warrant of infeftment; and that, in any conveyance of such lands in which all or any of the following clauses are necessarily or usually inserted, (*a*) a clause declaring the term of entry; (*b*) a clause expressing the manner of holding; (*c*) a procuratory or clause of resignation; (*d*) a clause of assignation of writs and evidents; (*e*) a clause of assignation of rents; (*f*) a clause of obligation to free and relieve of feu-duties and casualties due to the superior, and of public burdens; (*g*) a clause of warrandice; and (*h*) a procuratory or clause of registration for preservation or for preservation and execution, it shall be competent to insert all or any of such clauses in the form of No. 1 of Sched. (B) annexed to the Act; and that all or any of such clauses, if so inserted in any such conveyance, or in a conveyance dated after the 30th September 1847, shall have the meaning and effect assigned to them in the 6th and 8th sections of the Act, and shall be as valid as if the same had been expressed in the fuller mode or form generally in use prior to the 30th September 1847,—*i.e.*, the date from which the Lands Transference Act,

1847, came into operation. The form of Sched. (B), No. 1, is given hereafter. Sec. 6 of the Act of 1868 deals with the import of the clause expressing the manner of holding, and sec. 8, after dealing with the import of the clause of resignation, enacts: (1) that the clause of assignation of writs and evidents in the form of Sched. (B) shall, unless specially qualified, be held to import an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and as the case may be, therein contained, and to all unrecorded conveyances to which the disposer has right; (2) that the clause of assignation of rents in the form of the schedule shall, unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry; (3) that the clause of warrandice in these forms shall, unless specially qualified, be held to imply absolute warrandice as regards the lands, and writs and evidents and warrandice from fact and deed as regards the rents; (4) that the clause of obligation to free and relieve from feu-duties, casualties, and public burdens in form No. 1 of Sched. (B) shall, unless specially qualified, be held to import an obligation to relieve of all feu-duties or other duties and services or casualties payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry; and (5) that the clause of consent to registration in the two forms given in the schedule shall, unless specially qualified, have the meaning and import and effect assigned to them in the 138th section of the Act. The short clauses of consent to registration for preservation, and for preservation and execution, contained in form No. 1 of Sched. (B), when occurring in any deed or conveyance under the Act, or in any deed or writing or document of whatsoever nature, and whether relating to lands or not, import, unless specially qualified, a consent to registration, and a procuratory of registration in the Books of Council and Session, or other judges' books competent, therein to remain for preservation, and also, if for execution, that letters of horning and all necessary execution shall pass thereon upon six days' charge on a decree to be interponed thereto in common form (s. 138). Further, the Act of 1868 made it unnecessary in any conveyance or deed of or relating to lands to insert *ad longum* the real burdens or conditions, or provisions or limitations under which they are held, although these are appointed to be inserted in the investiture of the lands, provided the same are in such conveyance or deed specially referred to as set forth in full length in the conveyance or deed of or relating to such lands, recorded in the appropriate Register of Sasines wherein the same were first inserted, or in any such conveyance or deed of subsequent date so recorded, and forming part of the progress of titles of the lands conveyed, such reference being made in the terms set forth in Sched. (D) annexed to the Act (s. 10). The Act also provided that in all cases where any lands had been particularly described in any prior conveyance or deed of or relating thereto, recorded in the appropriate Register of Sasines, it should be sufficient in describing them to specify some leading name or names, or some distinctive description of the lands as contained in the titles thereto, and to specify the name of the county, and, where the lands were held by burgage tenure, or by any similar tenure, the name of the burgh and county in which they were situated, and to refer to the particular description of such lands as contained in such prior conveyance

or deed so recorded in the form set forth in Sched. (E) annexed to the Act (s. 11). The Act authorises the insertion, immediately before the testing clause of any conveyance of lands, a clause of direction in the form of No. 1 of Sched. (F) annexed to the Act (s. 12), specifying the part or parts of the conveyance which the granter thereof desires to be recorded in the Register of Sasines, and makes it competent, where several lands are comprehended in one conveyance in favour of the same person or persons, to insert a clause in the conveyance declaring that the whole or part of the lands conveyed and therein particularly described shall be designed and known in future by one general name, to be therein specified (s. 13).

2. *History and Import of (a) Obligation to Infest, and Manner of Holding ; (b) Procuratory or Clause of Resignation ; and (c) Precept of Sasine.*

(a) *Obligation to Infest, and Manner of Holding.*—Whilst it was lawful for a vassal to grant sub-feus in the absence of a clause in his feu-right prohibiting subinfeudation (see FEU-CHARTER), the rule in early times was that he could not transmit his feu so as to substitute a stranger in his place without the consent of the superior, but this rule was first modified and then abolished. It will be observed, from the form of the disposition in use before the Lands Transference Act, 1847, that the disposer, in the obligation to infest, obliged himself to infest the disponent by two manners of holding, “one thereof to be holden of me and my foresaids in free blench, for payment of a penny Scots in name of blench-farm, at Whitsunday yearly, upon the ground of the said lands, if asked only, and freeing and relieving us”—*i.e.* the disposer and his predecessors,—“of all feu-duties and other duties and services exigible out of the said lands and others by our superiors thereof.” This part of the obligation to infest was called the *de me* holding, and, as will be observed, it stipulates for a blench-duty to the disposer, and “in every part evinces its purpose as merely elusory, in order to effectuate a subordinate holding without creating any substantial estate of superiority in the disposer” (Menzies, 641). But in addition to granting to his disponent a *de me* holding, the disposer granted him an *a me* holding, thus expressed in the clause of obligation to infest: “and the other”—that is, the other holding—“of the said infestments to be holden from me and my foresaids of and under our said superiors, in the same manner that I, my predecessors and authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other.”

The holding *a me vel de me*, as it came to be called, had its origin in a device to evade the rule that a vassal could not, *invito superiore*, voluntarily alienate his lands so as to substitute a new vassal in his place. Prior to the seventeenth century, when it was the object of a seller and a purchaser not to create in perpetuity the relationship of superior and vassal between them, but to give at once security of title to the purchaser, with power to him to substitute himself sooner or later in the seller's place, the seller granted two separate deeds to the purchaser. Of these two deeds, the one was called a charter *de me*, because it bore that the lands were disposed to be held of the seller, *i.e.*, *de me*; and the other was called a charter *a me*, because it bore that the lands were disposed to be held of the seller's superior, *i.e.*, *a me*, or, as it is sometimes put, *a me de superiore meo*. On obtaining these two deeds, the seller expedite and recorded an instrument of sasine, the form of which was such that it could be referred either to the holding *de me* in the one deed or to the holding *a me* in the other: and the infestment thus taken gave him, until it was confirmed by the superior, a title to the lands,

which was valid against the seller and his subsequent disponees as well as his creditors, but created a mid-superiority in his favour. In other words, the infeftment, until confirmed, was ascribed to the *de me* holding, and the result was this: (a) a real right to the lands was vested in the purchaser; (b) a fee of mid-superiority was created in favour of the seller; (c) the seller remained the vassal of his own superior, and liable to him for the prestations of the feu; and (d) the purchaser's superior was the seller, the purchaser, however, being liable to relieve the seller of the annual prestations exacted from the seller by his superior. But the infeftment, when confirmed by the seller's superior, completely divested the seller of everything, and placed the purchaser in his room as vassal in the lands; and, after confirmation, the infeftment was ascribed to the *a me* holding, and the deed with the *de me* holding was dropped from the progress of titles. The confirmation of the infeftment had accordingly these effects: (a) to extinguish the fee of mid-superiority in the seller created by the infeftment *de me*, and thereby to extinguish the relationship of superior and vassal which had subsisted between the seller and the purchaser; (b) to extinguish the relationship of superior and vassal between the superior of the seller and the seller, and thereby to end the seller's liability for implement of the prestations of the feu; and (c) to substitute the relationship of superior and vassal between the seller's superior and the purchaser in lieu of that relationship which had subsisted between the superior and the seller, and, as a consequence, to make the purchaser liable to the superior in implement of the prestations of the feu.

The separate charters *de me* and *a me*, granted by a disponer to a disponee, gave place, at least as early as the beginning of the seventeenth century, to one deed—the disposition with an alternative manner of holding, *a me vel de me*, with a precept of sasine applicable to either holding. The infeftment on such a disposition, until it was confirmed by the superior, gave the disponee a valid title to the lands, with the disponer as his immediate superior: and the infeftment, when confirmed, substituted the disponee as a vassal in room of his disponer. The infeftment, until confirmed, had the same effect as regards the disponee and the disponer as infeftment on the deed with the *de me* holding formerly had; and the infeftment, when confirmed, operated in the same way as regards the disponer and the disponee as the confirmation of the superior did when two charters, the one *de me* and the other *a me*, had been used. The infeftment on the indefinite precept of sasine was termed base until confirmed, and public when confirmed (*Bishop of Aberdeen*, 1680, M. 3011, 3012, 2 Ross' L. C. 1; *Bellenden*, 1825, 2 Ross' L. C. 2; *Bothwell*, 1687, 2 Ross' L. C. 15); and, after confirmation, the disponee was not entitled to impute his infeftment to other than the *a me* holding (*Chancellor*, 1688, M. 3012; *Bothwell*, 1687, M. 3012).

The clause of obligation to infeft by two separate manners of holding, *i.e.*, *de me* and *a me*, continued in use until the commencement of the Lands Transference Act, 1847. That Act introduced a new form of the clause of obligation to infeft, which ran thus: "And I"—that is, the disponer—"oblige myself to infeft the said [*here insert the name of the disponee*] and his foresaids, to be holden *a me* [*or de me or a me vel de me, as the case may be*]" (s. 1, and Sched. (A)); and the Act declared of the clause of obligation to infeft in the form which it introduced, that if it should be limited to an obligation to infeft *a me* only, it should be held to imply an obligation on the disponer to infeft the disponee, and his heirs and assignees, in the subjects conveyed, upon their own expenses, to be holden from the disponer, and his heirs and successors, of and under their immediate lawful superiors,

in the same manner as the disponent himself, or his predecessors or authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other; and that the clause of obligation to infeft, if granted to be holden *a me vel de me*, should be held to imply an obligation on the disponent to infeft the disponent, and his heirs and successors, upon their own expenses, by two several infeftments and manners of holding, one thereof to be holden of the disponent and his heirs and successors in free blench, for payment of a penny Scots in name of blench-farm, at Whitsunday yearly, upon the ground of the lands, if asked only, and freeing and relieving him and them of all feu-duties and other duties and services exigible out of the said lands and others by their immediate lawful superiors thereof: and the other of the said infeftments to be holden from the grantor and his foresaids of and under their immediate lawful superiors, in the same manner as the grantor, or his predecessors or authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other (s. 2). It will be noticed that the short clause of obligation to infeft introduced by the Act of 1847 imported what the older form of the clause expressed.

The Titles to Land Act, 1858, rendered it unnecessary to insert in any conveyance a clause of obligation to infeft, and declared that if land should be disposed to be held *a me* only, or *a me vel de me*, the clause so expressing the manner of holding should imply that the lands were to be held in the manner expressed in the Lands Transference Act, 1847, with reference to obligations to infeft *a me* or *a me vel de me* respectively (s. 5). The Act of 1858 also declared that where no holding was expressed, the conveyance should be held to imply that the lands were "*to be holden in the same manner in which the grantor of the conveyance held or might have held the same*" (s. 5): but the Titles to Land Act, 1860, declared that the words in italics should be construed to mean that the lands were to be held *a me vel de me* where the investiture of lands contained no prohibition against subinfeudation, or against an alternative holding, and *a me* only where the investiture contained such prohibition, and provided that, where the investiture contained such prohibition, the conveyance or instrument should, if an entry in the lands therein specified or thereby conveyed was expedite with the superior within twelve months from the date of such conveyance or instrument, have the same preference in all respects from the date of recording in the appropriate Register of Sasines the conveyance or instrument as if the same contained an *a me vel de me* holding, and the investiture did not contain any prohibition against subinfeudation, or against an alternative holding (s. 36).

Repealing the Lands Transference Act, 1847, and the Titles to Land Acts, 1858 and 1860, the Titles to Land Act, 1868, re-enacted the provision in the Act of 1858 that it should not be necessary to insert in any conveyance of lands a clause of obligation to infeft (s. 5), and gave a form of the clause expressing the manner of holding. This clause, which was introduced into the disposition immediately after the clause declaring the term of entry, ran thus: "To be holden the said lands and others [*or subjects*] *a me* [*or a me vel de me, as the case may be*]" (s. 5, Sched. (B) No. 1). Sec. 6 of the Act, dealing with the import of the clause expressing the manner of holding, and repeating the provisions contained in sec. 5 of the Act of 1858 and sec. 36 of the Act of 1860, enacted—

If the lands have been or shall be conveyed to be holden *a me* only, the clause so expressing the manner of holding shall imply that the lands are to be holden from the

granter of and under his immediate lawful superiors, in the same manner as the granter or his predecessors or authors held, hold, or might have holden the same, and that the title of the disponee may be completed either by resignation or confirmation, or both, the one without prejudice of the other, and if the lands shall be disposed to be holden *a me vel de me*, the clause so expressing the manner of holding shall imply that the lands are either to be holden of the granter in free blench, for payment of a penny Scots in name of blench-farm, at Whitsunday yearly, upon the ground of the lands, if asked only, and freeing and relieving the granter of all feu-duties and other duties and services exigible out of the said lands by his immediate lawful superiors thereof, or to be holden from the granter of and under his immediate lawful superiors, in the same manner as the granter or his predecessors or authors held, hold, or might have holden the same, and that the title of the disponee may be completed either by resignation or confirmation, or both, the one without prejudice of the other, and where no manner of holding is expressed the conveyance shall be held to imply that the lands are to be holden in the same manner as if the conveyance contained a clause expressing the manner of holding to be *a me vel de me*, where the titles of the lands contain no prohibition against subinfeudation, or against an alternative holding, and as if the conveyance contained a clause expressing the manner of holding to be *a me*, where the titles contain such prohibitions, or either of them: Provided always, that where the said titles contain such prohibitions, or either of them, the conveyance shall, if an entry in the lands therein specified or thereby conveyed be expedite with the superior within twelve months from the date of such conveyance, have the same preference in all respects from the date of recording the conveyance or any instrument thereon in the appropriate Register of Sasines, as if such conveyance contained a clause expressing the manner of holding to be *a me vel de me*, and the titles did not contain any prohibition against subinfeudation or against an alternative holding: And provided always, that nothing contained in this Act shall be construed to take away or impair any of the rights and remedies competent to a superior against his vassal lying out unentered.

The following points are worthy of note in connection with the clause of obligation to infeft and manner of holding: (1) Prior to the Titles to Land Act, 1858, an *a me* holding only was implied in a disposition containing no holding (*Buchan*, 1678, M. 2258; and *Peebles*, 1825, 4 S. 290). A *de me* holding had to be expressed, and was not inferred from an obligation, e.g. to infeft the disponee "by two infeftments and manners of holding, and that either by resignation or confirmation, or both, the one without prejudice to the other" (*Peebles*, *supra*); and if a disposition specified one manner of holding only, the indefinite precept was construed as directing infeftment to be given so as to constitute that holding and no other (*Rowand*, 1824, 3 S. 196). (2) Infeftment in virtue of a disposition with an *a me* holding, express or implied, did not, until followed by confirmation, divest the disposer or invest the disponee, i.e. such infeftment, without confirmation, was, before 1858, null (*Rowand*, *supra*; *Peebles*, *supra*; *Menzies*, 629). (3) After the Titles to Land Act, 1860, till the commencement of the Conveyancing Act, 1874, when a disposition contained no manner of holding, an *a me vel de me* holding was implied in cases in which the titles of the lands contained no prohibition against subinfeudation or against an alternative holding; but an *a me* holding only was implied in cases in which the titles contained such prohibitions, or either of them, the conveyance in this case, however, having the same preference in all respects from the date of infeftment thereon as if the conveyance contained a clause expressing the manner of holding to be *a me vel de me*, and the titles did not contain any prohibition against subinfeudation or against an alternative holding, in the event of an entry in the lands being expedite with the superior within twelve months from the date of the conveyance (31 & 32 Vict. c. 101, s. 6). Notwithstanding this provision regarding the effect of entry within twelve months from the date of a conveyance implying an *a me* holding on account of a prohibition against subinfeudation or against an alternative holding, the law seems to have been that if a second conveyance was granted



of the same lands to a *bonâ fide* third party, who obtained entry before the holder of the first conveyance, the first disponent could not, even within the twelve months, expedite an entry at all, because the entry of the second disponent completely divested the disponent (Bell, *Lect.* i. 688). (4) An alternative holding, not being designed to create a permanent base right, was not deemed a contravention of a prohibition against subinfeudation (*Colquhoun*, 1867, 5 M. 773). (5) When a purchaser of heritage did not stipulate for an alternative holding, the seller was not bound to grant him a disposition with such a holding; for the seller was bound to grant the purchaser only such a disposition as would enable him to take his place under his superior (*Miller*, 1843, 6 D. 149). (6) Whilst a holding *de me* is still inserted in a feu-right, no holding has been necessary in a disposition since the commencement of the Conveyancing Act, 1874.

(b) *Procuratory, or Clause of Resignation in Favorem*.—The procuratory of resignation was a mandate by the disponent (sometimes called the resigner) authorising the giving back of the lands to the superior thereof, in order that he might reconvey them to the disponent (sometimes called the resignatary), to be held of the superior as the disponent himself held them. This was also the import of the clause of resignation which, after 1847, superseded the procuratory of resignation. The procuratory of resignation *in favorem* is not to be confounded with the procuratory of resignation *ad remanentiam*, which was inserted in, *inter alia*, a disposition of property in favour of the superior by his vassal, and authorised the surrender of the lands into the hands of the superior in order that they might remain with him. The procuratory of resignation *in favorem*, as the style of the disposition in use before 1847 shows, authorised procurators to surrender the lands to the superior or his commissioners for “new infeftment,” *i.e.* infeftment in favour of the disponent under the disposition containing the procuratory; whereas the procuratory of resignation *ad remanentiam* authorised procurators to surrender the lands to the superior or his commissioners “as in his own hands and for his behoof *ad perpetuam remanentiam*, to the effect that the right of property which stood in my”—*i.e.* the vassal’s—“person may be established and consolidated in the person of the said B.”—*i.e.* the superior—“with his right of superiority of the same, and remain inseparable therefrom in all time coming.” Although procuratories of resignation *in favorem*, like procuratories of resignation *ad remanentiam*, were usually embodied in dispositions of property, yet a procuratory of resignation was *per se*, until the commencement of the Conveyancing Act, 1874, a *habile* mode of conveying property to a disponent (Duff, 208, 225; Menzies, 624), and a procuratory of resignation was before 1874, and, it is thought, still is, a competent method of reconveying a fee of property to the superior thereof. At one time it was not uncommon to frame deeds of entail in the form of a procuratory of resignation *in favorem* (Duff, 226).

The form of the procuratory of resignation *in favorem* having already been given, its history may now be given. The Lands Transference Act, 1847, made it unnecessary to use the old form. This Act introduced a clause of resignation in these terms: “And I resign the said lands and others for new infeftment” (s. 1, and Sched. (A)), and declared that such a clause, in a conveyance by a vassal to a stranger, should be equivalent to a procuratory of resignation in the terms then in use, and that it, if it were inserted in a conveyance by a vassal to his superior, should be equivalent to

a procuratory of resignation *ad remanentiam* (s. 3). It being found inconvenient to have a clause of resignation which fell to be read as a clause of resignation either *in favorem* or *ad remanentiam*, according to the nature of the disposition in which it appeared, the Titles to Land Act, 1858, enacted that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only unless specially expressed to be a resignation *ad remanentiam* (s. 5). This Act, however, provided, in order to avoid inconvenience in cases where a clause of resignation in the form introduced by the Act of 1847 had been inserted in conveyances in favour of superiors, that nothing contained in the Act should prevent an instrument of resignation *ad remanentiam* from being expedited, and recorded on a conveyance theretofore granted, and containing a clause of resignation in the form authorised by the Act of 1847 (s. 5). Repealing the Lands Transference Act, 1847, and the Titles to Land Act, 1858, the Titles to Land Consolidation Act, 1868, enacted that in any conveyance of lands in Scotland not held by burgage tenure in which a procuratory or clause of resignation was necessarily or usually inserted, it should be competent to insert a clause in this form: "And I resign the said lands and others [or subjects] for new infeftment or investiture" (s. 5, and Sched. (B), No. 1), and declared that a clause for resigning lands in this form should be held and taken to be equivalent to a procuratory of resignation *in favorem* only in the terms in use prior to the 30th September 1847, unless specially expressed to be a resignation *ad remanentiam*, in which case it should be equivalent to a procuratory of resignation *ad remanentiam* according to the form in use prior to that date (s. 8).

In connection with the procuratory and the clause of resignation *in favorem*, these points should be kept in view: (1) that they were impliedly abolished by the Conveyancing Act, 1874, which renders incompetent the granting of charters or writs of resignation; but that, prior to 1847, a procuratory of resignation *in favorem*, and, after 1847, till the commencement of the Conveyancing Act, 1874, either a procuratory or a clause of resignation *in favorem* was an essential in a disposition when the disponent desired to enter by resignation; (2) that, although at common law both procuratories of resignation and precepts of sasine fell by the death of either granter or grantee, the Statute 1693, c. 35, provided that procuratories of resignation, as well as precepts of sasine, might be executed after the death of the parties in whose favour they were made, on condition that instruments of resignation and sasine taken after the death of either party expressed the titles of those in whose favour the resignation was made and to whom the sasine was granted, and that the same were deduced therein, and that the Infeftment Act of 1845, which abolished instruments of resignation *in favorem* provided that such deduction should be made in the charter of resignation (s. 9); and (3) that a procuratory or clause of resignation *in favorem* granted by a person base infeft was not a valid warrant for resignation, until his base infeftment was expressly or constructively made public by his superior.

(c) *Precept of Sasine*.—The precept of sasine will be fully dealt with in treating of the feu-charter, and it is only necessary in this article to note one or two facts connected with its history. The precept of sasine was a mandate by the disponent to give his disponent delivery of the lands, and was the executive clause of a feu-right and one of the executive clauses of the disposition. Before the Infeftment Act, 1845, the precept of sasine required the disponent's bailie to give to the disponent heritable state and

sasine, but by that Act a shorter form of the precept was authorised, by which the disponent desired any notary public to give sasine to his disponent. The form of precept of sasine authorised by the Act of 1845 was repeated by the Lands Transference Act, 1847, and the precept of sasine, either in the form in use before 1845, or in the form authorised by both the Infertment Act of 1845 and the Lands Transference Act, 1847, can still be inserted in a disposition or a feu-right, although its insertion is not essential. For the Titles to Land Act, 1858, made it unnecessary, after 1 October 1858, to expedite and record an instrument of sasine on any conveyance of lands; and declared that it should be sufficient for the person or persons, in whose favour a conveyance was granted, instead of expediting and recording such an instrument of sasine, to record the conveyance itself, with a warrant of registration thereon, in the appropriate Register of Sasines (s. 1). The Titles to Land Consolidation Act, 1868, also declared that it should not be necessary in any conveyance of lands to insert therein a precept of sasine (s. 5). Although the absence of a precept does not now prevent the disponent from taking infertment either by recording the conveyance or by expediting and recording a notarial instrument, yet if a conveyance contains no precept of sasine, infertment under it cannot be taken by means of an instrument of sasine, whether in the form in use prior to the Infertment Act of 1845, or in the form authorised by that Act. It has already been pointed out that prior to the Conveyancing Act, 1874, a procuratory or a clause of resignation was essential to a disposition in the event of the disponent desiring to complete his title to the lands by resignation; but it follows from what has been said regarding the precept of sasine, that after the Titles to Land Act, 1858, a disponent holding a disposition containing no precept of sasine could take infertment in the property in virtue of his disposition, and then enter by confirmation with the superior of the lands.

### *3. Completion of Disponent's Title by Confirmation or by Resignation prior to the commencement of the Conveyancing Act, 1874.*

In dealing with the Feu-Charter it will be shown that all that a grantee under a feu-right had to do prior to 1858, in order to complete his title to the lands conveyed to him, was to take infertment in virtue of the precept of sasine contained in the feu-right, and that he could after 1858 complete his title by recording the feu-right with a warrant of registration in his favour, even although it did not contain a precept of sasine. This arose from the fact that his infertment proceeded on a warrant granted by the superior of the lands, and therefore required no confirmation. But prior to the Conveyancing Act, 1874, a disponent under a disposition, as opposed to a feu-right, required the intervention or recognition of the superior of the lands in order to complete his title, and thereby place himself in the position of a vassal. Such recognition or intervention was embodied in a charter or writ of confirmation, which was obtained from the superior by the disponent after his infertment, or in a charter or writ of resignation, or, it might be, a combined charter of resignation and confirmation, which was obtained by the disponent before he took infertment.

The next few pages relate chiefly to charters and writs of confirmation, and charters and writs of resignation, and combined charters of resignation and confirmation; but let it be said here that a disponent under a disposition containing an *a me* or an *a me vel de me* holding took infertment on his disposition exactly in the same way as the grantee of a

feu-charter did. Thus, suppose A., an entered vassal, disposed lands to B. in 1844, by a disposition containing an obligation to infeft and an alternative manner of holding, a procuratory of resignation *in favorem*, and a precept of sasine. B. could take infeftment in the lands exactly as if he had been a disponent under a feu-charter containing a *de me* holding and a precept of sasine. There would, however, be this difference between the infeftment under the disposition and under the feu-charter, that B.'s infeftment under the disposition required, in order that his title might be quite complete, and that he might be substituted as a vassal in A.'s (his disponent's) place, to be confirmed by the superior of the lands, whereas the infeftment under the feu-charter was complete, because the disponent under the charter was to hold in perpetuity of his disponent, as opposed to his disponent's superior. Accordingly, in the case supposed, B. could in 1844 take infeftment in the lands contained in his disposition by these steps: (a) symbolical delivery on the lands; (b) the expeding of an instrument of sasine in the form in use prior to 1845; and (c) the recording of the instrument within sixty days of its date in the General Register of Sasines, or in the Particular Register of Sasines applicable to the lands. These steps gave B. a base infeftment in the lands, which had to be followed by a charter of confirmation in his favour from his disponent's superior to complete his title so as to place him in his disponent A.'s place. If, however, B.'s disposition, in the case supposed, had contained only an *a me* holding, infeftment would not have given him a real right in the land until followed by confirmation.

It is well to explain that a charter of resignation before the commencement of the Titles to Land Act, 1858, contained a precept of sasine, in virtue of which the disponent (or resignatory) took infeftment in the same way as he did in virtue of a precept of sasine in a feu-charter or a disposition. Thus, to take the case supposed in the preceding paragraph, if B. desired to make up his title by resignation instead of confirmation, he, in virtue of the procuratory of resignation contained in the disposition in his favour, could, *e.g.*, in 1844, have obtained a charter of resignation from his disponent's superior. This charter of resignation contained, *inter alia*, a clause of *teneudas* to the effect that the lands were to be held of the granter of the charter, and a precept of sasine. In virtue of this precept of sasine, B. took infeftment by the same steps as he would have used had he taken infeftment under the precept of sasine in the disposition, *viz.*: (a) symbolical delivery on the lands; (b) the expeding of an instrument of sasine in the form in use prior to 1845; and (c) the recording of the instrument within sixty days of its date in the General Register of Sasines, or in the Particular Register of Sasines applicable to the lands. This procedure gave B. infeftment in the lands, and the effect of it was at once to substitute B. in the room of his disponent as vassal in the lands.

The history of (a) charters and writs of confirmation, and (b) charters of resignation, combined charters of resignation and confirmation, and writs of resignation, requires notice in dealing with the subject of the completion of a disponent's title.

(a) *Charters and Writs of Confirmation.*—When a disponent of lands after a base infeftment in his favour completed a title by confirmation, he, as already stated, obtained, before the commencement of the Titles to Land Act, 1858, a charter of confirmation, and after the commencement of that Act, until the commencement of the Conveyancing Act, 1874, either a charter or a writ of confirmation, the granter of the charter or the writ being the superior of the lands.

The form of the charter of confirmation in use prior to the Infefment Act, 1845, often contained these parts: (1) narrative clause; (2) clause of confirmation; (3) clause declaring confirmation to be as valid as if writs confirmed had been engrossed *verbatim*, or as if the confirmation had been made and granted before the taking of infefment, and containing dispensation with all defects of the confirmation; (4) the *tenendas*; (5) the *reddendo*; (6) the clause known as the clause *salvo jure cujuslibet* ("reserving always my"—*i.e.* the superior's—"own right, and the right of all others, as accords of law"); (7) clause of registration for preservation; and (8) testing clause. (See *Jurid. Styles*, 3rd ed., i. 561; Duff, 212.)

The operative clause in the character of confirmation was the confirming clause, which, with the testing clause, and nothing else, would have given the deed full efficacy. The confirming clause, be it observed, either confirmed the lands, and the transmissions and relative infefments subsequent to the last public infefment, or, without confirming the lands specially, confirmed the transmissions and relative infefments, the description of the lands in this case being introduced by way of narrative. (*Jurid. Styles*, 3rd ed., i. 563.)

Finical objections to the terms in which a deed was identified in a charter of confirmation were disregarded (*Adam*, 12 June 1810, F. C.). Confirmation in general terms of all writs was in one case held effectual, and the argument repelled that the charter of confirmation required to specify the deeds confirmed (*Drummond*, 1793, M. 6936; affd. 1797, M. 6939). At one time it appears to have been common to confirm the disposition, together with the precept of sasine therein insert, and instrument of sasine following or to follow thereupon (Duff, 219). Probably confirmation of a disposition prior to infefment would have been effectual (Bell, *Lect.* ii. 734); but confirmation before infefment was unknown in practice even in Mr. Duff's time.

The Infefment Act, 1845, did not deal in any way with entry by confirmation; but the Lands Transference Act, 1847, first conferred on heirs and disponees the same right to compel superiors to enter them by confirmation as the Act 20 Geo. II. c. 50 gave them, after 25 March 1748, to compel entry by resignation (s. 6). Long before the Lands Transference Act, 1847, was passed, entry by confirmation was, however, very common,—so common, indeed, that Mr. Duff, writing in 1838, expresses the opinion that an entry by confirmation might have been insisted on in cases where the superior could qualify no interest to refuse it (Duff, 214). The Lands Transference Act, 1847, enacted that where any charter of confirmation, whether granted by Her Majesty or her royal successors, or by the Prince of Scotland, or by a subject-superior, should confirm the lands therein contained themselves, and the instrument of sasine thereon in favour of the person receiving such charter, such charter might be expressed in the form set forth in Sched. (D) annexed to the Act, and that in whatever habile form expressed, it should be held to confirm in favour of such person, so far as regards such lands, the whole dispositions and instruments of sasine, and other deeds, instruments, and writings of and concerning the same necessary to be confirmed in order to complete such person's investiture in the lands as immediate vassal of such superior, although such deeds, instruments, and writings might not be enumerated in the charter (s. 7).

The Titles to Land Act, 1858, first introduced the writ of confirmation and the writ of resignation. By the Act it was provided that where lands were held of a subject-superior, and a confirmation of any deed or instrument of sasine recorded in the appropriate Register of Sasines was

required, it should be competent for the superior to confirm such deed or instrument by a writ of confirmation to be written thereon in the form of Sched. (E), and that the confirmation so granted should be as effectual as a charter of confirmation according to the law and practice existing at the date of the Act (s. 7). The superior, if required, was bound so to confirm, provided that the party requiring confirmation was entitled to demand an entry by confirmation, and produced, if required, to the superior a charter or other writ showing the *tenendas* and *reddendo* of the lands contained in the deed or instrument to be confirmed, and also at the same time paid or tendered to the superior such duties or casualties as he might be entitled to demand (s. 7). Confirmation so granted, the Act declared, should be held to confirm the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of the party obtaining confirmation (s. 7). Similar provisions were by the Act made applicable to lands held of the Crown or Prince and Steward of Scotland (s. 6).

The Titles to Land Act, 1868, repealed the provisions from 1847 onwards above set forth, but in substance re-enacted the provisions which it repealed. By sec. 97 of the Act of 1868 it was enacted:—

Where any person is or shall be infeft in lands holden of a subject-superior upon a conveyance or deed of or relating to such lands granted by or derived from the person last entered with the superior and infeft, or granted by or derived from a person whose own title to such lands is capable of being made public by confirmation according to the existing law and practice, which conveyance or deed shall contain an obligation to infeft *a me* or *a me vel de me*, or shall contain a clause expressing the manner of holding to be *a me* or *a me vel de me*, or shall imply that the manner of holding is *a me* or *a me vel de me*, or upon any conveyance or deed which under this Act or any of the repealed Acts shall be equivalent to or have the effect of such a conveyance, it shall be lawful and competent for such person, upon production to the Lord Ordinary on the Bills in the Court of Session of his infeftment, whether the same shall consist of such conveyance or deed itself, with a warrant of registration thereon in his favour, recorded in the appropriate Register of Sasines, or of an instrument or instruments in his favour, applicable to such lands, following on such conveyance or deed, and recorded in the appropriate Register of Sasines, and warrants of the same, and upon showing the terms and conditions under which the said lands are holden of the superior thereof, to obtain warrant for letters of homing to charge the superior to grant in favour of such person a writ or charter of confirmation in the same way and form as is provided and in use for compelling entry by resignation: Provided always, that the charger shall at the same time pay or tender to such superior such duties or casualties as he is by law entitled to receive upon the entry of the charger, and that it shall be lawful for every such superior to show cause why he ought not to be compelled to give obedience to such charge by presenting a note of suspension to the Court of Session in the usual manner.

The Act of 1868 also authorised a person requiring confirmation, and entitled to demand an entry thereby, to demand from the superior *either* a writ of confirmation in the form given in Sched. (V), No. 1, of the Act, which was engrossed on the recorded conveyance, or deed, or instrument constituting his infeftment; *or*, in his option, a charter of confirmation in the form given in the Sched. (V), No. 2, annexed to the Act (s. 98). But, as under the Act of 1858, such person had to produce to the superior, if required to do so, a charter or other writ showing the *tenendas* and *reddendo* of the lands contained in the writ to be confirmed, in addition to paying or tendering such duties or casualties as were due to the superior; and the superior was entitled to insert or refer in the writ or charter granted by him to the whole clauses, burdens, and conditions contained in the former charter, in so far as they were not set forth at length or validly referred to in terms of the Act, or of any of the Acts it repealed, in the writ confirmed (s. 98). Sched. (V), No. 1, which contained the form of a writ of confirmation by a subject-superior, ran thus:—

I, A. B. [here insert name and designation of superior], hereby confirm this disposition [or other deed or conveyance, as the case may be] in favour of C. D., as vassal in room and place of E. F. [here name and design last vassal in the lands] entered by [here specify the charter or other writ by which the last vassal was entered, instrument thereon, if any, and date of registration in the Register of Sasines if recorded], but only in so far as consistent with the [here specify, or refer to if previously specified, a charter or other writ containing the *tenendas* and *reddendo*, etc.], and with my own rights. [If the *reddendo* is to be different from that in the charter or other writ specified or referred to, or if the vassal should desire, specify the *reddendo* here.]—In witness whereof [insert a testing clause in usual form].

Sched. (V.), No. 2, which gave the form of a charter of confirmation by a subject-superior, was as follows:—

I, A. B., immediate lawful superior of the lands and others after mentioned, do hereby confirm for ever to and in favour of C. D. [here name the party in whose favour the charter is granted], and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [here insert, or refer, as in Sched. (E) or Sched. (G), as the case may be, to the lands to be confirmed, and if under conditions of entail or real burdens, etc., insert them or refer to them as in Sched. (C) or Sched. (D), as the case may be], and a [here specify the deed or conveyance which is to be confirmed in favour of C. D., and if the same has been recorded with warrant of registration in his favour, add, with warrant of registration thereon], in favour of the said C. D., recorded in the [here describe the register in which the said deed or conveyance is recorded], on the            day of           , or of whatever other date or tenor the said disposition [or other deed or conveyance] may be, and that in so far as relates to the lands and others hereby confirmed, to be holden, the said lands and others, immediately of me and my successors, superiors thereof, in free blench-farm [or in feu-farm, as the case may be], for ever, paying therefor [here insert the *reddendo*]. And I consent to the registration hereof for preservation.—In witness whereof [insert a testing clause in usual form].

In the granting of all writs and charters by subject-superiors, the Act of 1868, like the Act of 1858, provided that it should be sufficient to refer to the *tenendas* and *reddendo* of the lands therein contained as set forth at length, either in the writ or charter produced to the superior in terms of the Act, or in any charter or other writ recorded in any public register, and that subject-superiors should be bound, if required, to grant such writs and charters containing such reference in like manner as they were bound to grant similar charters according to the forms in use prior to 1 October 1858 (s. 100). Every charter and writ of confirmation, whether from the Crown or from a subject-superior, should, it was enacted, operate a confirmation of the whole prior deeds and conveyances necessary to be confirmed in order to complete the investiture of the person obtaining the writ or charter (s. 115). Removing a doubt entertained after the passing of the Titles to Land Act, 1858, as to whether a writ of confirmation or of resignation required to be probative, the Act provided that they should be authenticated in the form required by the law of Scotland in the case of ordinary conveyances (s. 114).

With regard to the effect of confirmation, the rule was that it operated *retro* to the dates of the infeftments confirmed in the absence of a mid-impediment, notwithstanding the death of both the disponent and the disponent (*M'Dowall*, 1793, M. 8807, 2 Ross' L. C. 127; *Lockhart*, 1837, 16 S. 76, 2 Ross' L. C. 129; and see *Campbell*, 1663, M. 1302). The retroactive effect of confirmation was prevented by the existence of what was called a mid-impediment. Thus, suppose that A., an entered vassal, disposed his lands first to B., with an *a me vel de me* holding, and then to C., with an *a me* or an *a me vel de me* holding, that B. took base infeftment, but did not obtain confirmation, and that C. afterwards took infeftment and then obtained a charter of confirmation, the state of the title would have stood thus: A. would have been entirely divested, B. would have been infeft in the

property, and C. would have been infeft in the mid-superiority created in favour of A. by B.'s base infeftment, and the result would have been that B.'s immediate superior would be C., and that the right of C. to the mid-superiority would have prevented B. from obtaining a charter of confirmation from the person who would have been his immediate superior in the absence of the right in C., which operated as a mid-impediment against confirmation in B.'s favour. No mid-impediment was created by a superior granting to a vassal's heir a precept of *clare constat*, including lands which had been disposed by the heir's ancestor to a person who had or had not taken infeftment prior to the ancestor's death. The heir was considered *eodem persona cum defuncto*, and the donee could at any time supersede the title in the person of the heir, just as he could have superseded that in the person of his disposer (*Fullerton*, 1833, 12 S. 117). An infeftment *a me* unconfirmed, which was carried by a general service, could be renounced, and the renunciation operated as a mid-impediment to a subsequent confirmation thereof (*Douglas*, 1713, 2 Ross' L. C. 135).

Before leaving the subject of charters and writs of confirmation, it is proper to mention a form of charter of confirmation which has for a very long time been obsolete. In the earlier history of our land-rights, sub-vassals sometimes obtained a document called a charter of confirmation from their mediate superiors, not in order that they might hold directly of these mediate superiors, but that, if the right to the lands in their own immediate superior was forfeited on account of his death or any delinquency on his part, their subaltern rights might not be involved in the forfeiture (*Menzies*, 630; *Bell*, *Lect.* ii. 736).

(b) *Charters of Resignation, Combined Charters of Resignation and Confirmation, and Writs of Resignation.*—It is conceded by all writers on conveyancing that transference of feudal rights in land by resignation was more in accordance with feudal rules than transference by confirmation. But undoubtedly entry by confirmation became the more common in practice; nor is the reason for this difficult to find. For not only did base infeftment in virtue of an *a me vel de me* holding at once give a real right to the property, but the superior's right to exact an untaxed casualty on the entry of a singular successor might be postponed by a singular successor who simply took base infeftment. Such a singular successor, so infeft, could, on the death of the last entered vassal, arrange with his heir to make up a title to the mid-superiority created in his ancestor's person by a base infeftment, the heir on entry being liable, in the absence of anything to the contrary in the feu-right, in payment of relief duty only. The heir was not bound to enter into any such arrangement with a donee of his ancestor; but if he was willing to do so, the superior could not legally object, although such an arrangement as to the mid-superiority might result in his obtaining payment of nothing but relief duty, in circumstances in which, apart from the arrangement, he would have been able to exact payment of composition.

The means devised by donees of enforcing an entry from an unwilling superior, prior to 1747, have been alluded to in the article on CONFIRMATION BY A SUPERIOR. In that year was passed the Act 20 Geo. II. c. 50, which first gave heirs and singular successors of a vassal a statutory right to compel his superior to enter them as vassals. The Act of 1747 provided, *inter alia*, that any person who should purchase or acquire lands or heritages, held of subject-superiors, from the former proprietor or vassal who was duly vested and seized therein, and who should obtain from such vendor or former proprietor a disposition or conveyance containing a



*procuratory of resignation in favorem* should be entitled to charge the superior or superiors in the lands contained in such procuratory of resignation to receive or grant new infeftment to him (ss. 12, 13).

Before 1845 the steps in taking entry by resignation in the case of a disponent, whose disponent was an entered vassal, were as follows: (1) a disposition in favour of the disponent, containing, *inter alia*, a procuratory of resignation in his favour; (2) symbolical surrender to the superior, or to his commissioner specially appointed, in presence of the superior or his commissioner, and of a notary public and two witnesses, by the disponent's attorney, by delivery of "staff and baton,"—*i.e.*, as custom construed these words, by delivery of a pen and redelivery thereof to the disponent; (3) the expeding of an instrument of resignation *in favorem*; (4) the granting of a charter of resignation by the superior in favour of the disponent, which contained a precept of sasine; and (5) infeftment in favour of the disponent in virtue of the precept of sasine in the charter of resignation, which infeftment was taken, after symbolical delivery on the lands, by expeding an instrument of sasine, and recording it within sixty days of its date, either in the General Register of Sasines, or in the Particular Register of Sasines applicable to the lands. With regard to steps (2) and (3) above mentioned,—*i.e.* the symbolical surrender to the superior, and the expeding of an instrument of resignation *in favorem*,—it is explained that, in the case of entries with subject-superiors, the ceremony of symbolical delivery, and the expeding of an instrument of resignation *in favorem*, had become almost, if not altogether, obsolete long before 1845; that even when such an instrument was expedited, the narrative of the symbolical surrender contained in it was in most cases fictitious; and that it was specially decided that a charter of resignation could not be validly objected to although no such instrument had ever been expedited (*Renton*, 1848, 11 D. 37, 2 Ross' L. C. 146). The form of the charter of resignation in use prior to 1845 was as follows:—

Be it known to all men, by this present charter, that I, A., immediate lawful superior of the lands and others after mentioned, in consideration of a certain sum in name of composition paid to me by E., have given, granted, and disposed, as I do by these presents give, grant, and dispose, and for me and my heirs and successors, perpetually confirm to and in favour of the said E., his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [take in the lands]: which lands and others before disposed, formerly pertained heritably to D., holden by him of me as immediate lawful superior thereof, and were, with all right, title, and interest which the said D. had or anywise might have, claim, or pretend thereto, duly and lawfully resigned by him, and his procurators in his name to that effect specially constituted, by virtue of the procuratory of resignation contained in a disposition of said lands and others, dated \_\_\_\_\_ made and granted by the said D. in favour of the said E. in the hands of me the said A., as immediate lawful superior thereof, purely and simply by staff and baton as use is; in favour and for new infeftment of the same to be made and granted to the said E. and his foresaids, heritably and irredeemably, in due and competent form; as authentic instruments taken upon the said resignation [if in the hands of a notary public, state his name here] of the date hereof more fully bear: To be holden the said lands and others above disposed by the said E. and his heirs and assignees, of and under me, my heirs and successors, immediate lawful superiors thereof, in feu (or blench) farm, fee, and heritage for ever, by all the righteous meiths and marches thereof, as the same lie in length and breadth, with free ish and entry thereto, and All and Sundry parts, pendicles, and righteous pertinents thereof, freely and quietly without any impediment or obstacle whatever: Paying therefor yearly, the said E. and his foresaids, to me, my heirs and successors, for the said lands and others above specified, the sum of £ \_\_\_\_\_

Clause I.—  
Narrative  
Clause.  
Clause II.—  
Dispositive  
Clause.  
Clause III.—  
*Quaquidem*  
Clause.  
Clause IV.—  
*Tenendos*.  
Clause V.—  
*Reddendo*.

[Here specify the duties, whether feu, blench, or

- otherwise] and these for all other burden, exaction, demand, or secular service, which can anywise be asked or required forth of the said lands in all time coming. And I consent to the registration hereof in the Books of Council and Session, therein to remain for preservation : and thereto constitute my procurators, etc. Moreover
- Clause VI.—  
Registration. I hereby desire and require you and each of you, jointly and severally, my bailies in that part to the effect under written specially constituted, that upon sight hereof ye pass to the ground of the foresaid lands, and there give and deliver heritable state and sasine, actual, real, and corporal possession of All and Whole the foresaid lands of with the pertinents, lying and described in manner foresaid, and here held as repeated *breuitatis causa*, to the said E. and his foresaids, and that by deliverance to him or them, or to his or their certain attorney or attornies in his or their names, bearers hereof, of earth and stone of the ground of the said lands and others, and all other symbols usual and necessary, saving always and reserving to me the bygone and current feu-duties in so far as they have not been paid, *et salvo jure cujuslibet*. And this in nowise ye leave undone : Which to do, I commit to you, and each of you, conjunctly and severally, my full power, by this my precept of sasine specially directed
- Clause VII.—  
Precept of Sasine. to you for that effect.—In witness whereof, etc.
- Clause VIII.—  
Clause *salvo jure*, etc. to you for that effect.—In witness whereof, etc.
- Clause XI.—  
esting Clause. to you for that effect.—In witness whereof, etc.

(*Jurid. Styles*, 3rd ed., i. 557.)

The combined charter of resignation and confirmation was necessary when the disponent granting a disposition with a procuratory of resignation was not an entered vassal. Thus, if A., an entered vassal, disposed to B., who, after base infeftment, disposed to C., who, after base infeftment, disposed to D., and the dispositions in favour of B., C., and D. contained an obligation to infeft *a me vel de me*, procuratory of resignation and precept of sasine, the procuratory of resignation in D.'s disposition was not a sufficient warrant for a simple charter of resignation; for resignation was competent only by a vassal in the hands of his own immediate superior, and C., D.'s author, being in the case supposed only base infeft, was not the vassal of the superior of the lands, *i.e.* of the superior of whom A. held. D., in entering by resignation, obtained a charter of resignation and confirmation, which contained not only the clauses contained in the charter of resignation, but, over and above these clauses, a confirming clause, which was usually inserted before the clause of consent to registration. The *quarquidem* clause in the charter of resignation and confirmation set forth that the lands formerly belonged to the disponent of the disponent seeking entry,—*i.e.* to C., in the case supposed,—and were holden by him, in virtue of the confirmation thereafter contained, immediately of the granter of the charter as superior, and had been resigned by him into the hands of the granter of the charter by virtue of a procuratory of resignation contained in a disposition of the lands granted by him in favour of the disponent who was entering by resignation; and the confirming clause confirmed the transmissions and infeftments thereon subsequent to the last public infeftment up to but excluding the disposition in favour of the disponent seeking entry, *i.e.* in the case supposed the dispositions and sasines in favour of B. and C. Thus in the case supposed the *quarquidem* clause would run—

Which lands and others above described, formerly belonging to C., holden by him in virtue of the confirmation hereinafter contained immediately of me as superior thereof, and have been resigned by him into my hands by virtue of a procuratory of resignation contained in a disposition of the said lands and others granted by him in favour of the said D., dated the                      day of                      18 .

And the confirming clause, to be found in a later part of the combined charter of resignation and confirmation, would be in these terms:—

And I hereby confirm for ever to and in favour of the said *D.* and his-foresaid the following writs and titles, in so far as they relate to the lands and others before described, viz. [*narrate dispositions and sasines in favour of B. and C.*], or of whatever dates and tenor the said writs may be.

After obtaining a charter of resignation, or a combined charter of resignation and confirmation, the disponent or resignatory took infeftment under it in virtue of the precept of sasine which it contained, exactly in the same manner as he took infeftment in virtue of the precept of sasine contained in a feu-right or a disposition. Thus the holder of a charter of resignation, or a charter of resignation and confirmation, took infeftment before 1845 by having expedite, after symbolical delivery of the lands, an instrument of sasine which was recorded within sixty days of its date in either the General Register of Sasines, or the Particular Register of Sasines applicable to the lands.

*Fictio juris*, the superior was by the resignation of the vassal invested with the lands so as to be in a position to dispose them to the resignatory; but the act of resignation did not divest the resigner until the resignatory had taken infeftment (Ersk. ii. 7. 23). Accordingly, Craig divides resignation into three parts: (1) the renunciation by the resigner: (2) the acceptance by the superior; (3) the infeftment: "*Prima est renunciatio personæ resignantis in favorem alterius; secunda est domini acceptatio; tertia traditio et investitura illi facta in ejus favorem resignatio facta est*" (Craig, iii. 1. 17).

After the Infeftment Act, 1845, a charter of resignation, or a charter of confirmation and resignation, could contain a precept of sasine in the form introduced by that Act, because it was a deed in the sense of the Act, including a warrant on which sasine might follow (ss. 5, 10). Besides, the Act rendered it unnecessary for the disponent in taking infeftment to perform any act of symbolical delivery on the lands, and enabled him to record an instrument of sasine, if expedite in the form introduced by the Act, at any time within his life (ss. 1, 2, 3, 4, and 5). It has already been pointed out that instruments of resignation *in favorem*, the object of which was merely to connect a procuratory with a charter of resignation, fell into disuse, and sec. 9 of the Act of 1845, on the narrative that such instruments were rarely used in practice and were wholly unnecessary, abolished them, subject to this provision, that the deduction of titles required by the Statute 1693, c. 35, to be made in such instruments should, after the date of the Act, be made in the charter of resignation.

The Lands Transference Act, 1847, although it enacted that a charter of confirmation confirming the lands and the instrument of sasine in favour of the person obtaining confirmation should be held as confirmation of the whole deeds, instruments, and writings regarding the lands (s. 7), introduced no change as regards either the charter of resignation or the charter of resignation and confirmation.

The provisions of the Titles to Land Act, 1858, besides rendering the insertion of a precept of sasine unnecessary in a charter of resignation (ss. 5 and 36), and making it competent to describe the lands by reference (ss. 15, 16, and 36), authorised infeftment under it by recording it with a warrant of registration in the appropriate Register of Sasines (ss. 1 and 36). The Act of 1858, in addition to introducing writs of confirmation, also introduced writs of resignation. Sec. 9 of the Act enacted that where lands were held of a subject-superior, and a new investiture by resignation should be required, it should be competent for the superior to grant in favour of the party in right of the deed which was the warrant for resign-

nation a writ of resignation as nearly as might be in the form of Sched. (F) of the Act, which should be written on such deed, and that the deed, with the writ of resignation written thereon, should be as effectual as if a charter of resignation had been granted in the usual form, according to the law and practice then existing, and that the superior should be bound to grant such writ of resignation instead of a charter of resignation, if required so to do.

Sec. 9 also stipulated that the party requiring a writ of resignation not only should be entitled to demand an entry by resignation, but also should, if required, produce to the superior a charter or other writ showing the *tenendas* and *reddendo* of the lands resigned, and should also at the same time pay or tender to the superior such duties or casualties as he might be entitled to demand. The writ of resignation, like the writ of confirmation, was declared to operate as a confirmation of the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of the party obtaining the writ (s. 9). Further, it was declared competent to record in the appropriate Register of Sasines the deed, with the writ of resignation written thereon, and warrant of registration also written thereon; and the recording of the same, it was enacted, should have the same effect in all respects as if a charter of resignation had been granted, and such charter had been followed by an instrument of sasine duly expedited and recorded at the date of recording the said deed and writ, according to the law and practice then existing, in favour of the party on whose behalf the deed and writ were presented for registration; "provided always, that the recording of such deed along with such writ *shall* have the effect of an instrument of sasine following on such deed" (s. 9). By mistake the word "not" was omitted after the word "shall," and the result was that writs of resignation by subject-superiors could not be used without creating a split. But this omission was remedied by the Titles to Land Act, 1860 (s. 33), which repealed the words above quoted, and enacted in lieu thereof that when a deed, which was the warrant for resignation, with a writ of resignation written thereon, had been or should be recorded in the appropriate Register of Sasines, the recording of such deed along with such writ should not have the effect of an instrument of sasine following on such deed. As in the case of charters of confirmation, charters of resignation might contain a reference to the *tenendas* and *reddendo* of the lands as set forth at length in any writ recorded in any public register (s. 10).

Accordingly, after 1858, a party desiring entry by resignation could do so in one of these ways: (*a*) by recording the disposition containing a procuratory or clause of resignation in his favour, with a writ of resignation from the superior of the lands written thereon, and warrant of registration also written thereon, in the appropriate Register of Sasines; or (*b*) by obtaining a charter of resignation (whether or not it contained a precept of sasine), and recording it with a warrant of registration; or (*c*) by obtaining a charter of resignation containing a precept of sasine, and recording an instrument of sasine thereon.

In drawing charters of resignation it was competent to insert a description of the lands in accordance with sec. 34 of the Titles to Land Act, 1860. This Act also provided that charters of resignation or sale should operate as a confirmation of the whole deeds and instruments necessary to be confirmed, in order to complete the investiture of the party in whose favour such charter might be or might have been granted (s. 39). With regard to this provision, it will be kept in mind that, although charters of confirmation confirming the lands and sasine in favour of the

parties entering by confirmation operated, after 1847, confirmation of all writs requiring to be confirmed, and that writs of confirmation and writs of resignation operated after 1858 as confirmation of all writs requiring to be confirmed, yet that if the granter of a procuratory of resignation was not an entered vassal, and he desired, even after 1858, not a writ of resignation but a charter, it was necessary for him to obtain a charter of resignation and confirmation which confirmed all the transmissions and infeftments (including those of his author) subsequent to the last public infeftment. The provision, however, of the Act of 1860, making charters of resignation operate as a confirmation of all writs necessary to be confirmed, superseded the need for a charter of resignation and confirmation.

The Titles to Land Consolidation Act, 1868, repealing the enactments regarding entry by resignation above mentioned, contained in the Acts passed between 1845 and 1868, re-enacted them with variations. Of the provisions regarding investiture by resignation from a subject-superior the most important were contained in sec. 99, which provided—

Where a new investiture from a subject-superior by resignation shall be required, it shall be competent for the superior to grant, in favour of the person in right of the conveyance or deed which is the warrant for resignation, a writ of resignation, which shall be written on such conveyance or deed as nearly as may be in the form given in Sched. (V), No. 3, hereto annexed, or, in the option of the person resigning, by a charter of resignation in, or as nearly as may be in, the form given in Sched. (V), No. 4, hereto annexed; and the conveyance or deed, with such writ of resignation written thereon, or the charter of resignation in the separate form, shall be, to all intents and purposes, as effectual as if a charter of resignation had been granted in the usual form, according to the law and practice prior to the first day of October one thousand eight hundred and fifty-eight, and the superior shall be bound to grant such writ of resignation or such charter of resignation, if required so to do, instead of a charter of resignation in the form in use prior to said date: Provided always, that the party requiring such writ or charter be entitled to demand an entry by resignation, and that he shall, if required, produce to the superior a charter or other writ showing the *tenendas* and *reddendo* of the lands resigned, and shall also at the same time pay or tender to the superior such duties or casualties as he may be entitled to demand; and it shall be competent to record in the appropriate Register of Sasines the conveyance or deed, with the writ of resignation engrossed thereon, and warrant of registration also written thereon, or the charter of resignation with warrant of registration written thereon, or to expedite a notarial instrument on such charter, and to record such instrument, with warrant of registration thereon, in the appropriate Register of Sasines, and the recording of the conveyance or deed, with the writ of resignation and warrant of registration thereon, or of the charter, with warrant of registration thereon, or of the instrument, with warrant of registration thereon, shall have the same legal force and effect in all respects as if a charter of resignation had been granted, and such charter had been followed by an instrument of sasine duly expedite and recorded at the date of recording the said conveyance or deed, and writ or charter, or instrument, according to the law and practice prior to the first day of October one thousand eight hundred and fifty-eight, in favour of the party on whose behalf the conveyance or deed, and writ or charter, or instrument, are presented for registration: Provided always, that the recording of such conveyance, along with such writ and warrant of registration thereon, shall not have the effect of an instrument of sasine following on such conveyance or deed.

Sched. (V), No. 3, was as follows:—

I, A. B. [here insert name and designation of superior], in respect of the within clause [or procuratory] of resignation, disposed to C. D. the lands contained in this disposition [or other deed of conveyance, as the case may be], in his favour [or in favour of G. H., or otherwise, as the case may be, specifying shortly the connecting title], as vassal in room and place of E. F. [here name and design last vassal in the lands] entered by [here specify the charter or other writ by which the last vassal was entered, and instrument thereon, if any, and date of registration in Register of Sasine if recorded] but only in so far as consistent with the [here specify or refer to, if previously specified, a charter or other writ containing the *tenendas* and *reddendo*, etc.] and with my own rights. [If the *reddendo* is to be different from that in the charter or other writ specified or referred to, or if the vassal should desire, specify the *reddendo* here].—In respect whereof [insert a testing clause in usual form].

This form of the writ differs, it may be noticed, from the form of a writ introduced by the Titles to Land Act, 1858, in specifying the name of the last entered vassal and the writ by which he was entered.

The terms of Sched. (V), No. 4, were these :—

1. *L. M.*, immediate lawful superior of the lands and others after mentioned, do hereby give, grant, dispone, and for ever confirm to *A. B.* and his heirs and assignees whomsoever [or in case there be a substitution of heirs, here insert it at full length, or refer to it as in Sched. (C)], heritably and irredeemably, All and Whole [here insert or refer as in Sched. (E) or Sched. (G), as the case may be, to the lands, and if held under conditions of entail or real burdens, etc., insert them or refer to them as in the Sched. (C) or Sched. (D), as the case may be], which lands and others formerly belonged to *C. D.*, holden by him of me as his immediate lawful superior thereof, in terms of [here state briefly the investiture of the last entered vassal], and have been resigned by him into my hands by virtue of a procuratory [or clause] of resignation contained in a disposition [or other deed or conveyance, as the case may be] of the said lands and others granted by him in favour of the said *A. B.*, dated [here insert the date]; to be holden the said lands and others of me, my heirs and successors, in free blench-farm [or in feu-farm, as the case may be] for ever, paying therefor [here insert the reddendo]; and I consent to the registration hereof for preservation.—In witness whereof [insert a testing clause in usual form].

The Act of 1868 re-enacted the provisions of the Act of 1858, to the effect that it should be sufficient to refer to the *tenendas* and *reddendo* of the lands contained, *inter alia*, in charters or writs of resignation as these were set forth at length in any writ recorded in any public register: and that, if the person entitled to entry objected, the superior was not entitled in a charter or writ of resignation to insert the *tenendas* and *reddendo* at length, but only to make such reference to them (s. 100); and that all charters and writs of resignation should be authenticated in the form required by the law of Scotland in the case of ordinary conveyances (s. 114). The Act authorised not only the recording of a charter of resignation (s. 15), but also the expediting and recording of a notarial instrument on any charter of resignation (s. 17).

The charter of resignation and confirmation was used when the last disponee of property desired to enter by resignation as opposed to confirmation, and it has been shown that this charter confirmed the transmissions and sasines subsequent to the last entered vassal's infeftment down to but exclusive of the disposition in favour of the disponee, who sought entry by resignation. Although this was the proper practice, it was also held competent for a disponee to make up a title by a charter of confirmation and resignation, which confirmed the writs subsequent to the last entered vassal's infeftment, inclusive of his own infeftment, on the ground that he was entitled to make up a title either by resignation or by confirmation, or both, the one without prejudice to the other (*Cunninghame*, 1754, 5 Br. Sup. 809, 2 Ross' L. C. 157; *Stewart*, 1827, 5 S. 383, 2 Ross' L. C. 160; *Bell, Lect.* ii. 743).

In connection with entry by resignation it will be well to keep these points in view:—

- (1) A vassal who granted a procuratory of resignation was not divested of the lands until his disponee was infeft under the charter of resignation, or of resignation and confirmation, as the case might be; and it followed from this that a second resignation in favour of a third party, followed by infeftment, prevented infeftment under a prior charter of resignation (*Bell on Completing Titles*, 263; and see *Thomson*, 1628, 1 Br. Sup. 51; *A.*, 1626, M. 6889; and comp. *Muir*, 1588, M. 6887); and that the lands fell into non-entry in the event of the death of the last vassal prior to infeftment under a charter of resignation (*Purres*, 1677, M. 6890, and 2 Ross' L. C. 140).

- (2) A superior, when divested by his vassal's infeftment, could not make a second grant of the subject without being reinvested, *fictione juris*, by the resignation or by the death of the vassal (*Griecie*, 1760, M. 3022, 2 Ross' L. C. 152; *Marquis of Clydesdale*, 1726, M. 1262, 2 Ross' L. C. 149; and see *Laudales*, 1752, M. 14465); and the rule was that the terms of a charter of resignation, to be effectual against third parties, had to correspond with those of its warrant (*Cobbinsion*, 1724, M. 10449, 2 Ross' L. C. 156; and *Lord Renton*, 1666, 2 Ross' L. C. 155, M. 2840).
- (3) Unlike a precept of *clere constat*, a precept of sasine in a charter of resignation was assignable, and a superior was not entitled to insist that a grantee of a charter who paid composition for his entry should take infeftment so as to prevent him from assigning the charter to another (*Stewart*, 1794, M. 15027, 2 Ross' L. C. 161); but a superior, in granting a charter of resignation to the heir of his vassal in virtue of a procuratory or clause of resignation granted by the vassal, was entitled to insist either on the heir's paying composition as a singular successor, or on his taking infeftment on the charter (*Magistrates of Musselburgh*, M. 15038, 2 Ross' L. C. 166; Bell, *Lect.* ii. 1144; Bell on *Completing Titles*, 267).
- (4) Infeftment on a charter of resignation, followed by possession for the prescriptive period, constitutes a valid title to lands, and production of the deed containing the procuratory or clause of resignation is unnecessary after the years of prescriptive possession have run (*Creditors of Tillicoultry*, 1701, M. 12743; 1617, c. 12; and see 37 & 38 Vict. c. 94, s. 34).
- (5) Although the delivery of a charter by progress, without reservation, imported a discharge of all prior feu-duties and casualties (*Cassilis*, 1682, M. 6414; *Gibson*, 1739, M. 6500; *Tailors of Glasgow*, 1851, 13 D. 1073; and see Lord Kyllachy in *Marshall*, 1895, 22 R. 954), yet, on the principle that such a charter was granted in compliance with a legal obligation on the superior, and *periculo potentis*, it did not debar the granter of it from the benefit of inhibition used by him, prior to granting it, against the granter of the disposition on which it proceeded (*Lord Forbes*, 1673, M. 6517), nor from vindicating a right to the property afterwards emerging to him (Bell, *Lect.* ii. 740).
- (6) To grant valid charters and writs by progress, a superior's title to the *dominium directum* had to be complete: but if a proprietor of the *dominium directum*, whilst he was not infeft, granted charters, or writs by progress, and afterwards completed a title, the charters and writs by progress would be validated *accetione* (*Innes*, 1844, 7 D. 141; and comp. *Norton*, 6 July 1813, F. C.), and the result would have been the same even if the granter of the charters and writs had had, at the time of granting them, no right or title to the superiority, but afterwards acquired and completed a title to it (see *Swan*, 1866, 4 M. 663).
- (7) A vassal could not refuse to enter on the ground of an alleged defect in the superior's title, where the title was *ex facie* valid and there was no competition for the right of superiority (*Gibson-Craig*, 1838, 16 S. 1332; aff'd. 1841, 2 Rob. 446, 2 Ross' L. C. 329; and see *Macdougall*, 1880, 8 R. 42; aff'd. 1881, 8 R. (H.L.), 92).

4. *Disposition and Infeftment since the commencement of the Conveyancing Act, 1874.*

The form of disposition now in use is regulated by the provisions of the Titles to Land Act, 1868, as amended by the provisions of the Conveyancing Act, 1874. The principal provisions of the Act of 1874, so far as they relate to the disposition, are the following:—(1) It is incompetent to object to the validity of any conveyance of heritage coming into operation after the passing of the Act (7 August 1874), on the ground that it does not contain the word “dispone,” provided it contains any other word or words importing conveyance or transference or present intention to convey or transfer (s. 27, and see s. 20 of 31 & 32 Vict. c. 101, as to use of *de presenti* words of conveyance in *mortis causa* deeds). (2) It repealed sec. 11 of the Act of 1868 (which related to descriptions of lands by reference), and provides that in all cases where any lands have been particularly described in any conveyance, deed, or instrument relating thereto, recorded in the appropriate Register of Sasines, it is unnecessary, in any subsequent conveyance, deed, or instrument conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, and makes it sufficient to specify the name of the county, and where the lands were held burghage or by any similar tenure prior to the commencement of the Act (1 October 1874), the name of the burgh and county in which the lands are situated, and to refer to the particular description of such lands as contained in such prior conveyance, deed, or instrument so recorded in the form set forth in Sched. (O) annexed to the Act (s. 61, and see *Murray's Tr.*, 1887, 14 R. 856). (3) According to the Act of 1874, reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations affecting lands may be effectually imported into any deed relating to such lands by reference to a deed applicable to such lands, or to the estate of which such lands form a part, recorded in the appropriate Register of Sasines, and in which such reservations, real burdens, etc. are set forth at full length, a reference in the form set forth in Sched. (H) of the Act or in a similar form being sufficient; and the Act also makes it lawful for any proprietor of lands to execute a deed setting forth the reservations, etc. under which he is to feu or otherwise deal with his lands or any part thereof, and to record the same in the appropriate Register of Sasines, and, on such a deed being recorded, such reservations, etc. may be effectually imported into any deed or conveyance relating to such lands subsequently granted by such proprietor or by any other person, provided it is expressly stated in such deed or conveyance that it is granted under the reservations, etc. set forth in the deed containing them *ad longum* (s. 32; and see also s. 10 of 31 & 32 Vict. c. 101). (4) Where no term of entry is stated in a conveyance of lands, the entry is declared, by the Act of 1874, to be at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it appears from the terms of the conveyance that another term of entry was intended (s. 28). (5) Prior to the commencement of the Conveyancing Act, 1874, it was according to proper practice to insert in a disposition a clause setting forth the manner of holding of the subjects disposed, *i.e.*, *a me* or *a me vel de me* as the case might be, as well as to insert in it a clause of resignation: but as the Act of 1874 makes infeftment imply entry with the superior (s. 4), it is unnecessary to insert any manner of holding or any procuratory or clause of resignation in a disposition (see s. 26). (6) The Act of 1874 also provides that it shall be no objection to the probative character of a deed, whether



relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed or in the testing clause thereof, provided that, where the witnesses are not so named and designed, their designation shall be appended to or follow their subscriptions, and that such designations may be so added at any time before the deed has been recorded in any register for preservation or founded on in any Court, and need not be written by the witnesses themselves.

The statutory forms of the formal clauses of a disposition of land are still regulated by Sched. (B), No. 1, of the Titles to Land Consolidation Act, 1868; and if the clause expressing the manner of holding, and the clause of resignation, both now unnecessary, are omitted, the schedule runs thus:—

[*After the inductive and dispositive clauses the deed may proceed thus:*] With entry at the term of [*here specify the date of entry*]; and I assign the writs and have delivered the same according to inventory; and I assign the rents; and I bind myself to free and relieve the said disponent and his foresaids of all feu-duties, casualties and public burdens; and I grant warrandice; and I consent to registration hereof for preservation [or for preservation and execution]. In witness whereof [*insert a testing-clause in the usual form*].

It is unnecessary to deal here with the separate clauses of the disposition, because their respective imports will be shown in treating of the feu charter. It is sufficient to remark that the import of the clauses assigning the writs and the rents, the clause relieving the disponent of feu-duties and public burdens, and the clauses of warrandice and registration, when in the form of Sched. (B), No. 1, of the Act of 1868, is declared, as has been already mentioned, by sec. 8 of that Act.

The Conveyancing Act, 1874, contained, as already indicated, a most important provision, to the effect that infestment should imply entry with the superior. "Every proprietor," runs the Act, "who is at the commencement of this Act, or thereafter shall be, duly infest in the lands, shall be deemed and held to be, as at the date of the registration of such infestment in the appropriate Register of Sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infest to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice, and that whether the superior's own title, or that of any over-superior has been completed or not" (s. 4 (2)). The Act also provides that it shall not, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing (7 August 1874) of the Act, or in any deed, instrument, or writing, whether dated before or after the passing of the Act, be necessary, in order to the completion of the title of any person having a right to lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress; and that it shall not be competent for the superior in any case to grant any such precept, charter, or other writ by progress (s. 4 (1)). The Act, however, whilst abolishing charters and writs by progress, does not prevent the granting of charters of novodamus, or precepts, or writs from Chancery, or of *clare constat*, or writs of acknowledgment (s. 4 (1)). Among the charters and other writs by progress, which the Conveyancing Act, 1874, abolishes, are charters and writs of confirmation, charters and writs of resignation,

and combined charters of confirmation and resignation. In consequence of the provisions of the statute making infeftment imply entry with the superior, and removing the need for renewal of investiture, a disponee under a disposition can complete a title to the lands therein contained, exactly in the same way as a disponee under a feu charter. Thus, suppose that A., with a feudal title to lands, grants a disposition of them to B., and that the disposition contains a particular description or other description of the lands, warranting infeftment *de plano* (see FEU CHARTER as to different kinds of descriptions), B. can take infeftment by either (a) recording the disposition, with a warrant of registration thereon in his favour, in the form of Sched. (H), No. 1, of the Act of 1868, in the appropriate Register of Sasines (31 & 32 Vict. c. 101, s. 15); or (b), having expedite and recorded a notarial instrument, with a warrant of registration, also in the form of Sched. (H), No. 1, in the appropriate Register of Sasines, the instrument itself being in the form of Sched. (J) of the Act of 1868 (*ib.* s. 17). There can still be inserted in a disposition a precept of sasine, in which case it is optional for the disponee to complete his title either in one of the two ways just mentioned, or by having expedite and recorded an instrument of sasine, with a warrant of registration in the form mentioned, in the appropriate Register of Sasines.

## II. DISPOSITION OF SUPERIORITY TO STRANGER OR TO VASSAL.

In dealing with an estate of superiority, it has always to be kept in view that such an estate can only exist "so as to be capable of transmission, after separation of the property by charter and infeftment. The estates cannot be separated by words or description, but only by actual infeftment detaching the property from the original *plenum dominium*. It was attempted in vain, therefore, to effect a separation by conveying the *dominium directum* to one disponee and the *dominium utile* to another, no vassalage having been created by infeftment" (Menzies, 666, citing *Norton*, 6 July 1813, F. C.). Nor is such separation effected by a disposition of property under reservation of the superiority. (See *Norton, supra*; and as to separation, see also *Williams and James*, 1872, 10 M. 362).

A superior may, on granting feu-rights, reserve power to divide the superiority without the vassal's consent; but, in the absence of such reservation, the rule is that a vassal can object to the superior's conveying the superiority in fee (*Montrose*, 1781, M. 8822; affd. 6 Pat. 805), or liferent (*Graham*, 1826, 4 S. 615), in different portions to different parties. The reason of this rule is, that the vassal is not bound to hold the property of more than one superior; for, holding of two or more superiors increases the number of persons to whom the feudal services are due, and, prior to the commencement of the Conveyancing Act, 1874, multiplication of superiors put the vassal to the expense of more than one entry. (See *Montrose* and *Graham, supra*; and *Maxwell*, 1741, M. 15015, 8817; Elch. No. 4, "Superior and Vassal"; *Sinclair*, 1754, 5 Br. Sup. 812). But a conveyance of a fee of superiority to two or more persons jointly is not a multiplication of superiors to which a vassal can object, because such disponees have only one estate vested in them (*Cargill*, 1837, 15 S. 408; and see *Lady Luss*, 1678, M. 15028). Where feus were originally distinct, and afterwards came to be included by the superior in one charter by progress, which described the lands therein separately, and contained distinct clauses of *reddendo*, he was held not to have lost the power of separate disposal of the *dominium directum* applicable to each feu (*Duke of Argyle, etc.*, 23 June 1813, F. C.; rev. 1819, 6 Pat. 410); and it was also held that where there were separate subjects

held by separate titles of the same superior, and the property of the subjects was acquired by one person, the holder of the superiority who had not included the subjects in the same charter, was not debarred from selling separately the superiority of such subject (*Dreghorn*, 1774, M. 15015). Objections to splitting the superiority can be waived by the vassal's consent or acquiescence, or lost by the negative prescription (Bell, *Lect.* ii. 754). But the vassal's consent to one kind of multiplication of superiors did not prevent him from objecting to a different multiplication (*Mare*, 1824, 3 S. 17); nor does his acquiescence for more than forty years in a division of the superiority among liferenters, cut off his right to challenge the division of the superiority among fiars (*Stewart*, 1823, 2 S. 300).

Just as a vassal can object to the multiplication of superiors, so he can object to the interjection of a mid-superiority fee between the superiority and the property (*Douglas of Kelhead*, 1670, M. 15012; *Archbishop of St. Andrews*, 1682, M. 15015; *Stewart*, 1610, M. 15012). The reason of this is, or at least was before 1874, that he had an interest to object to the number of superiors between himself and the Crown being increased. But, as in the case of multiplication of superiors, objection to such interjection could be debarred by reserved power in favour of the superior to create a mid-superiority fee, or waived by the vassal's consent or acquiescence (*Hotchkiss*, 1822, 2 S. 70), or cut off by the negative prescription, and did not apply when a superior, into whose hands a feu had fallen by forfeiture, bestowed a forfeited estate on a new vassal (*Earl of Argyll*, 1672, M. 15013; *Duke of Gordon*, 1714, M. 10975). A vassal cannot object to a superior's granting a heritable security over the superiority; for, although the creditor can levy the feu-duties, his security does not create a mid-superiority fee, but is a mere burden on the superiority (*Home*, 1794, M. 15077; Bell, *Lect.* ii. 753).

The form of disposition applicable to a conveyance of superiority in favour of either a vassal or a stranger will now be dealt with. There is not, and has never been, any difference between the form of a disposition of a superiority and the form of a disposition of property, with these three exceptions—(1) that in the narrative clause of the disposition of superiority the disponent is usually designated superior, although he may be called heritable proprietor, whereas the disponent in a disposition of property is usually designated heritable proprietor; (2) that the disposition of superiority assigns feu-duties, or blench duties, and casualties, whereas the disposition of property assigns rents; (3) that the disposition of superiority excepts from the warrandice clause the feu-rights of the lands, whereas leases are usually excepted from the warrandice clause in a disposition of property. The parts of a disposition of superiority since the commencement of the Conveyancing Act, 1874, have been—

- I. Narrative Clause:—"I, A. B., superior of the subjects hereinafter disposed," &c.
- II. Dispositive Clause.
- III. Term of Entry.
- IV. Assignment of Writs.
- V. Assignment of Feu-duties and Casualties:—"And I assign the feu and blench duties and casualties of superiority, or sums in lieu thereof, due and payable from and after the said term of entry."
- VI. Obligation to free of Public Burdens.
- VII. Clause of Warrandice:—"And I grant warrandice, excepting

*always therefrom the feu and other rights of property of the said subjects granted by me and my predecessors and authors to the feuars and vassals thereof, without prejudice to the right of the said B. to quarrel or impugn the same upon any ground in law not inferring warrandice against me and my heirs and successors.*

#### VIII. Clause of Registration.

#### IX. Testing Clause.

Prior to 1874, as now, the disposition of superiority contained the same clauses as were inserted in a disposition of property. Accordingly, in addition to the nine clauses mentioned above, there were before 1874 other clauses in a disposition of superiority, *e.g.*, before the commencement of the Conveyancing Act, 1874, a clause setting forth the manner of holding and a procuratory or clause of resignation, and before the commencement of the Titles to Land Act, 1858, not only the two clauses last mentioned, but also a precept of sasine.

In a disposition of superiority the dispositive clause usually conveys the lands; and this is the correct practice. But it is now settled that the superiority or *dominium directum per se* can be disposed without a conveyance of the lands themselves (*Gardner*, 1841, 3 D. 534; *Hamilton*, 23 Feb. 1819, F. C., 1 Ross' L. C. 22; *Hill*, 1828, 6 S. 1133; *Mackenzie*, 14 Dec. 1822, F. C.; *Williams and James*, 1872, 10 M. 362; and *cf. Park*, 16 May 1816, F. C. (overruled by *Hamilton* and *Gardner*, *supra*). Any real burdens affecting the disponent's title can be set forth, either *ad longum* or by reference in statutory form, in a disposition of superiority. When a superior has a right to the minerals of the feu, a disposition of the superiority will also carry right to such minerals, unless the deed shows that it was not intended by the parties to include them. (See *Orr*, 1892, 19 R. 700; *affd.* 1893, 20 R. (H. L.) 27, and *Fleeming*, 1868, 6 M. 782). Whilst the rule is that obligations enforceable by or against a superior are enforceable by or against his disponent in the superiority, yet the superior may be under obligations which, because personal to himself, do not bind his disponent (*Durie's Trs.*, 1889, 16 R. 1104).

Although there is no difference in form between a disposition of superiority to a vassal and such a disposition to a stranger, the terms of the destination to a vassal should be considered. For if the property and superiority are afterwards consolidated, the destination in the superiority title will, in event of intestacy, regulate the succession to the united fee. A disposition of superiority to a vassal implies a discharge of bygone feudal duties (*Earl of Argyll*, 1676, M. 6323), but such a disposition in favour of a third party gives him no right to quarrel the feu *propter non solum canonem* for any years during his disponent's holding (*Lord Wedderburn*, 1612, M. 6322, 7181).

In dispositions of superiority prior to 1874, the manner of holding was usually expressed to be *a me*, but an alternative holding might be inserted. For if the vassal objected to a disponent's base infeftment in the superiority, the latter could at once remove the ground of the objection by obtaining confirmation of his infeftment. (See *Bell*, *Lect.* ii. 753, and *Menzies*, 663.)

A disponent under a disposition of superiority completes his title, since the commencement of the Conveyancing Act, 1874, in the same way as does a disponent under a disposition of property. Just as a disponent of superiority completes his title now in the same way as a disponent of property, so did he before the commencement of the Conveyancing Act, 1874,—*i.e.* he took

base infeftment, and then obtained a charter or writ of confirmation from his disponent's superior, or first obtained a charter or writ of resignation and then took infeftment.

### III. DISPOSITION OF PROPERTY TO SUPERIOR.

Like any other person, a superior may purchase the property held by his vassal; and he may succeed to the property as the vassal's heir. It is now settled that a fee of property is a feudal estate in the same sense as a fee of superiority is; but in early times, when the property fees were deemed rather of the nature of a burden on the superiority, it seems that a property fee was renounced by the vassal to the superior on the latter's acquisition of it (Duff, 235; Bell, *Lect.* ii. 773); and that, when a superior succeeded as heir to his vassal, the property fee was deemed to merge *ipso jure* in the superiority, even without the superior's making up any title as heir to his vassal (Bell, *Lect.* ii. 774). It is, however, now fixed that, if a superior purchase from his vassal the *dominium utile*, he requires to obtain a conveyance of it, and that when he succeeds as heir to his vassal he requires to make up a title to the property in one of the ways competent to an heir (*Morton*, 1688, M. 6917). Even after it became the practice for a superior who purchased the property to obtain a disposition in his favour, and for a superior who succeeded as heir to the property to make up a title to it as heir, there remained a doubt as to whether, when a person made up separate titles to the superiority and the property respectively of the same lands, consolidation of the two fees did not operate *ipso jure*. It is now settled that consolidation does not take place *ipso jure* in such a case (*Bald*, 1786, affd. 1787, M. 15084, 2 Ross' L. C. 210, 230). How a superior makes up a title as heir to the property will be shown when the completion of an heir's title (see SERVICES and CLARE CONSTAT) is under consideration; but this is the proper place for showing how a superior obtains by singular title the property fee, and how, if he cares, he can consolidate the two fees.

Since the commencement of the Conveyancing Act, 1874, the practice has been, in the case of a superior's purchasing the *dominium utile* held of him, to obtain from his vassal a disposition in the same form as if he were a stranger to the feu, and to take infeftment under it, and then, his titles to the property and the superiority being complete, to record a minute of consolidation in the form of Sched. (C) annexed to the Act, with a warrant of registration in his favour, in the appropriate Register of Sasines (s. 6); and this method of consolidation is the one also adopted in practice by a vassal who acquires by purchase or succession the superiority of his lands.

Sched. (C) is as follows:—

I, A. B., heritable proprietor both of the immediate superiority and of the property [or of the mid-superiority] of All and Whole [describe or refer to the lands], hereby consolidate the property of the said lands [or the mid-superiority of the said lands] with the immediate superiority thereof.—In witness whereof [testing clause].

Although the method of consolidation above mentioned is the one which has been most generally followed in practice since 1874, the better opinion seems to be that nothing contained in the Act of that year prevents a superior who purchases the property fee from having inserted a procuratory or clause of resignation *ad remanentiam* in the disposition in his favour, and from taking infeftment under it. Such infeftment would, it is thought, since 1874, give him a valid title to the property, and operate consolidation of the two fees; and it is also thought that, after completing separate titles to the superiority and the property, the owner of them may, instead of recording a minute of consolidation in

the form of Sched. (C) of the Act of 1874, consolidate them by recording with a warrant of registration in his favour, a procuratory of resignation *ad remanentiam*. The form and the history of the procuratory or clause of resignation *ad remanentiam* inserted in a disposition of property in favour of a superior, as well as the separate writ, the procuratory or resignation *ad remanentiam*, will appear in the sequel.

In dealing historically with the disposition of property in favour of the superior, it may be noticed at the outset that, when the superior's object was to consolidate the property with the superiority, the disposition in his favour, unlike a disposition of property in favour of a stranger, did not require an obligation to infeft, or manner of holding, or precept of sasine, but that it contained a procuratory or clause of resignation *ad remanentiam*, as opposed to *in favorem*; and further that, in place of obtaining a disposition in his favour, a superior might obtain simply a separate procuratory of resignation *ad remanentiam* from his vassal. For, although the usual form was to obtain a disposition with a procuratory of resignation, a procuratory of resignation *ad remanentiam* was and is a habile form of transferring property to a superior (Duff, 243; Menzies, 613).

The clauses of a disposition of property in favour of a superior prior to the Infefment Act of 1845 were—(1) the introductory clause; (2) dispositive clause; (3) *quarquidem* clause; (4) obligation to resign; (5) the procuratory of resignation *ad remanentiam*; (6) clause of warrandice; (7) assignation of writs and rents from a certain time; (8) clause of warrandice of that assignation; (9) obligation to free the subjects of public burdens; (10) clause of delivery of titles; (11) clause of registration; (12) testing clause (Menzies, 616; Bell, *Leet*. ii. 777). The procuratory of resignation *ad remanentiam* found in the disposition ran thus:—

AND to the effect that my right of property of the said lands may be consolidated with the said *B.* his right of superiority of the same, I hereby BIND and OBLIGE me, my heirs and successors, to make due and lawful resignation of the same in the hands of the said *B.*, as my immediate lawful superior thereof, *ad perpetuam remanentiam*; AND for that end I hereby MAKE, CONSTITUTE, and ORDAIN, and each of them, my very lawful and undoubted procurators, for me and in my name to compare before the said *B.*, my immediate lawful superior of the said lands, or his commissioners in his name, having power to receive resignation *ad remanentiam*, at any time and place lawful and convenient; and there, with all due reverence and humility, purely and simply by staff and baton, as uséis, to RESIGN and SURRENDER, as I do hereby RESIGN and SURRENDER, *simpliciter* UPGIVE, OVERGIVE, and DELIVER, ALL and WHOLE (*here describe the lands shortly*), together with all right, title, and interest, claim of right, property, and possession, which I, my predecessors and authors, had, have, or anywise may have, claim, or pretend to the said lands and others, in the hands of the said *B.*, or of his commissioners in his name, as in his own hands and for his behoof *ad perpetuam remanentiam*, to the effect that the right of property in the said lands, which stood in my person, may be established and consolidated in the person of the said *B.*, with his right of superiority of the same, and remain inseparable therefrom in all time coming; acts, instruments, and documents in the premises to ask and take, and generally every other thing thereanent to do in the premises which I could do myself if personally present or which to the office of procuratory in such cases is known to pertain, promising hereby to RATIFY and CONFIRM whatever my said procurators shall lawfully do or cause to be done in the premises.

On obtaining a disposition containing the clauses just mentioned, the superior, if his disponee was entered in the property, or after entering him, if his infefment happened to be a base one, could infeft himself in the property, as well as consolidate the superiority and the property fees, by recording an instrument of resignation *ad remanentiam*, within sixty days of its date, in the General or Particular Register of Sasines applicable to the lands, the instrument being preceded by symbolical resignation of the

lands. At the ceremony of resignation five persons appeared—(1) a procurator on behalf of the vassal, (2) the superior or his commissioner specially authorised to receive resignation *ad remanentiam*, (3) a notary public, and (4 and 5) two witnesses. The procurator having the disposition with the procuratory of resignation *ad remanentiam* resigned the lands by delivering to the superior or his commissioner a pen, which came by universal practice to be used for staff and baton (Act of Sederunt, 11 Feb. 1708; *Earl of Aberdeen*, 1742, M. 14316; *Carmoy*, 1729, M. 14316). The superior or his commissioner received and retained the pen, and thereafter took instruments in the hands of the notary. After this symbolical resignation, an instrument of resignation *ad remanentiam* was expedited, the instrument requiring to be signed by the notary and the two witnesses on each page, and, as already said, recorded within sixty days of its date (1669, c. 3). The instrument of resignation was in the following form:—

IN THE NAME OF GOD, AMEN. BE IT KNOWN TO ALL MEN by this present public instrument, that upon the       day of       , and of the reign of our Sovereign Lord George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, the       year; IN PRESENCE of me, notary public, and witnesses after designed, hereto subscribing, compared personally *F.*, as procurator for *A.*, heritable proprietor of the lands and others after mentioned, specially constituted by virtue of a procuratory of resignation *ad remanentiam* dated       , made and granted by the said *A.* for resigning the lands and others after mentioned in favour of himself, his heirs and successors, immediate lawful superiors of the same, AND PASSED with us to the personal presence of the said *A.*, superior of the said lands and others; and there the said *F.*, as procurator for and in name and behalf of the said *A.*, RESIGNED and SURRENDERED, *simpliciter* UPGAVE, OVERGAVE, and DELIVERED, ALL AND WHOLE (*here take in the lands*, together with all right, title, and interest which the said *A.* had, or anyway might have, claim, or pretend to the said lands and others above described, or to any part thereof, in the hands and in favour of the said *A.*, immediate lawful superior of the same, *ad perpetuum remanentiam*, to the effect that the right of property of the said lands and others standing in the person of the said *A.* may be consolidated with the right of superiority of the same, and may remain and abide inseparable therefrom in all time coming, by virtue of and conform to the foresaid procuratory of resignation granted by the said *A.* for that effect; and that by deliverance made by the said *F.*, procurator foresaid, of staff and baton as use is, in the hands of the said *A.*, who accepted of the same; WHEREUPON, and upon all sundry the premises, the said *F.*, as procurator foresaid, asked and took instruments in the hands of me, notary public. THESE THINGS were so done at       day, month, and year of God before written, betwixt the hours of       and       , in presence of       and       , witnesses to the premises specially called and required, and hereto with me subscribing. *Et ego vero (here followed the notarial docket in Latin).*

The instrument of resignation had to set forth accurately the disposition or other deed containing the procuratory of resignation (*M. Millan*, 1831, 9 S. 551; and comp. *Duke of Argyll*, 1873, 11 M. 616), and to deduce the title of the person in whose favour it was expedited.

As has been shown in the preceding paragraph, the steps taken on behalf of one who had a completed title to the superiority, and who afterwards obtained a disposition of the property containing a procuratory of resignation *ad remanentiam*, to consolidate the two fees, were—(1) confirmation by himself of the title of the disposer of the property in the event of his infeftment being base: (2) symbolical resignation: (3) the expediting of an instrument of resignation *ad remanentiam*; and (4) the recording of it in the appropriate Register of Sasines within sixty days of its date. But if the proprietor of the superiority obtained a disposition of the property with the same clauses as those contained in a disposition to a stranger to the feu, then he took the following steps to effect consolidation:—(1 and 2) base infeftment in the property and charter of confirmation granted by himself

in his favour, or otherwise, a charter of resignation (or, if need be, a charter of resignation and confirmation) granted by himself in his own favour, and infeftment in the charter: (3) procuratory of resignation *ad remanentiam* granted by himself in his own favour; (4) symbolical delivery; (5) the expeding of an instrument of resignation; and (6) the recording of the instrument within sixty days of its date in the appropriate Register of Sasines. In the case just supposed it will be seen that the superior made up a title to the property in the same way as any dispoonce to it would have done—*i.e.*, he completed his title either by confirmation or by resignation, and then took the steps (3) to (6) to unite the two fees. Similarly, when a person had a completed title to the property, and afterwards acquired a completed title to the superiority, he, to effect consolidation of the two fees, took the steps (3) to (6) inclusive. But if his infeftment in the property was base, or his infeftment in the superiority was base, or if both infeftments were base, then, before proceeding to effect consolidation, he required to make public his base infeftment or infeftments, because prior to consolidation the titles to both fees had to be fully completed, and he had to hold the property directly of himself (see *Grant*, 1760, M. 8740; *Bell, Lect.* ii. 783, 786). A mid-impediment to resignation *ad remanentiam* in the hands of the fiar of the superiority was not created by the superiority being held in liferent by another (*Dundas*, 26 May 1812, F. C.), and resignation *ad remanentiam* in the hands of a liferent superior who was infeft with power to receive resignation and into the hands of the fiar who was not infeft was held effectual to consolidate the fees of property and superiority (*Redfearn*, 7 March 1816, F. C.).

The form of the separate procuratory of resignation *ad remanentiam* used by a person in right of the fees both of superiority and property of the same lands to consolidate them, was as follows:—

KNOW ALL MEN by these presents, that I, A., superior of the lands and others after mentioned, and also proprietor of the same, holding of myself, considering that I stand infeft and seised in ALL and WHOLE (*here take in the lands*), conform to an instrument of sasine in my favour, dated \_\_\_\_\_, and registered \_\_\_\_\_, proceeding on a disposition thereof, dated \_\_\_\_\_, granted by C., in my favour, whereby the right of property of the foresaid lands and pertinents thereof above specified, which formerly stood in the person of the said C., is now fully vested in my person: AND that by a charter of confirmation thereof, granted by me as superior foresaid, of the date hereof, the said lands are now held by me immediately of myself as superior thereof; and it being proper that my right of property of the foresaid subjects should be united and consolidated with the right of superiority of the same in my person, THEREFORE I hereby MAKE, CONSTITUTE, and ORDAIN \_\_\_\_\_, and each of them, my very lawful and undoubted procurators, for me and in my name to compar before myself, my heirs or successors, as immediate lawful superiors of the lands and others before and after specified, or before our commissioners in our name, having power to receive resignations thereof *ad remanentiam*, at any time and place lawful and convenient; and there purely and simply, by staff and baton as use is, to RESIGN and SURRENDER, like as I the said A. do hereby RESIGN and SURRENDER, *simpliciter* UPGIVE, OVERGIVE, and DELIVER, ALL and WHOLE (*here narrate the lands*), together with all right, title, and interest which I have or can pretend to the same, in the hands of me the said A., or my foresaids, as immediate lawful superiors of the same *ad perpetuum remanentiam*, to the effect that the right of property of the foresaid lands and others, which stand in my person as aforesaid, may be united and consolidated with my right of superiority of the same, and remain inseparable therefrom in the person of me, my heirs and successors, in all time coming; acts, instruments, and documents in the premises to ask and take, and generally every other thing to do as freely in all respects as I the said A. could do myself, or which to the officer of procuratory in such cases is known to pertain, promising to RATIFY and CONFIRM whatever my said procurators shall lawfully do, or cause to be done, in the premises. And I consent to the registration, etc.

(*Jurid. Styles*, 3rd ed., vol. i. 662.)



The Infektment Act, 1845, enacted that instruments of resignation *ad remanentiam* should be written in the same form as theretofore, but that it should be unnecessary for the notary public to adhibit his long docket to such instruments. Prior to the Act of 1845 it was necessary that resignation *ad remanentiam* should be accepted by the superior himself, or by a person having a formal commission for that purpose. The Act of 1845, however, allowed resignations *ad remanentiam* to be accepted by the known agent of the superior for the time, as well as by the superior himself, or by a person holding a formal commission for the purpose (8 & 9 Vict. c. 35, s. 8).

As already noticed, the Lands Transference Act, 1847, introduced forms of clauses for dispositions, and provided that a clause of resignation in the form, "*And I resign the said lands and others for new infektment,*" should be held equivalent to a procuratory of resignation *ad remanentiam* when it occurred in a disposition by a vassal to his superior (s. 3).

The Titles to Land Act, 1858, introduced important provisions with regard to resignation *ad remanentiam*. Until 1858 it was necessary in all cases in effecting consolidation to have resort to symbolical resignation, and to expedite and record within sixty days of its date an instrument of resignation *ad remanentiam*. The Act of 1858, however, provided that it should not be necessary to expedite and record an instrument of resignation *ad remanentiam* on any procuratory of resignation *ad remanentiam*, or on any conveyance containing an express clause of resignation *ad remanentiam*, but that it should be sufficient for the superior in whose favour the resignation under such a procuratory or conveyance was authorised to be made to record in the appropriate Register of Sasines such procuratory or such conveyance with a warrant of registration thereon, or to expedite and record a notarial instrument in the form of Sched. (B) of the Act. Such procuratory or conveyance and warrant, or such notarial instrument, being so recorded, should have, the Act declared, the same effect as if an instrument of resignation *ad remanentiam* had been expedite on such procuratory or conveyance, and had been recorded in the Register of Sasines according to the law and practice existing at the commencement of the Act at the date of recording such procuratory or conveyance or instrument (s. 4). Further, according to the Act, all instruments of resignation *ad remanentiam* might be in the form of Sched. (D), and when in such form might be recorded in the Register of Sasines at any time during the life of the party in whose favour the resignation was made, and the date of presentment and entry set forth on any instrument of resignation in such form by the keeper of the register should be the date of the resignation and of the instrument (s. 4). The Act also provided that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only, unless specially authorised to be a resignation *ad remanentiam*, subject to this provision, that nothing contained in the Act should prevent an instrument of resignation *ad remanentiam* from being expedite and recorded on a conveyance theretofore granted, and containing a clause of resignation in the form authorised by the Lands Transference Act, 1847 (s. 5). Accordingly, after 1858, a superior purchasing the property from an entered vassal, and obtaining a disposition with a clause of resignation *ad remanentiam*, could effect consolidation by recording in the appropriate Register of Sasines the disposition with a warrant of registration, or by expediting and recording a notarial instrument in the form of Sched. (B); or by expediting and recording an instrument of resignation *ad remanentiam* in the form of Sched. (D); or, after symbolical resignation, by expediting and recording within sixty days of its date an instrument

of resignation in the form used prior to the commencement of the Act. And the provisions of the Act allowed a person whose titles were duly completed to fees of property and superiority to effect consolidation by executing and recording a procuratory of resignation *ad remanentiam*, with warrant of registration thereon in his favour; or by executing a procuratory of resignation *ad remanentiam*, and thereafter expediting and recording a notarial instrument in the form of Sched. (B); or by executing a procuratory of resignation *ad remanentiam* and expediting and recording an instrument of resignation *ad remanentiam* in the form of Sched. (D); or by executing a procuratory of resignation *ad remanentiam*, followed by symbolical resignation, and by expediting and recording an instrument of resignation *ad remanentiam* in the form in use before the Act. It will be noticed that when a disposition in favour of a superior granted before the commencement of the Act contained a clause in the terms, "*And I resign the said lands and others for new infeftment,*" the Act required that the superior should expedite an instrument of resignation either in the form introduced by the Act of 1858 or in the form in use prior thereto; and that, while the instrument in the newer form did not require to be preceded by symbolical resignation, and could be recorded within his lifetime (s. 19), the instrument in the earlier form required to be preceded by symbolical resignation, and recorded within sixty days of its date.

Repeating and consolidating the provisions of the Acts of 1847 and of 1858, the Titles to Land Consolidation Act, 1868, by section 18, enacted:—

It shall not be necessary to expedite and record an instrument of resignation *ad remanentiam* on any procuratory of resignation *ad remanentiam*, or on any conveyance containing an express clause of resignation *ad remanentiam*, but it shall be competent and sufficient for the superior in whose favour the resignation under such procuratory or conveyance is authorised to be made to record in the appropriate register of sasines such procuratory or conveyance, with a warrant of registration thereon in the form or as nearly as may be in the form No. 1 of Sched. (H) hereto annexed, or to expedite and record a notarial instrument as nearly as may be in the form of Sched. (J) hereto annexed; and such procuratory or conveyance and warrant, or such notarial instrument, being so recorded, shall have the same effect as if, at the date of such recording, an instrument of resignation *ad remanentiam* in favour of the party on whose behalf the same is so recorded had been expedited on such procuratory or conveyance, and had been recorded in the appropriate register of sasines: Provided always, that nothing herein contained shall prevent an instrument of resignation *ad remanentiam* being expedited and recorded on a conveyance granted prior to the first day of October one thousand eight hundred and fifty-eight, and containing a clause of resignation authorised by the Act of the tenth and eleventh Victoria, chapter forty-eight; and that all instruments of resignation *ad remanentiam* may be in or as nearly as may be in the form of Sched. (K) hereto annexed; and when in such form, whether expedited before or after the commencement of this Act, the same may, with warrant of registration thereon, be recorded in the appropriate register of sasines at any time during the life of the party in whose favour the resignation is made, and the date of presentment and entry set forth on any instrument of resignation in such form by the keeper of the register, shall be the date of the resignation and of the instrument.

Sched. (K) is as follows:—

At \_\_\_\_\_ there was by [or on behalf of] *A. B.* [*here insert the name and designation of the superior*], presented to me, notary public subscribing, a disposition [or other deed or extract, as the case may be], dated the \_\_\_\_\_ day of \_\_\_\_\_, granted by *C. D.* [*here insert the name and designation of the vassal*], being the vassal in the lands after described, holding the same of the said *A. B.* as his superior thereof, by which disposition the said *C. D.* disposed to the said *A. B.*, and his heirs and assignees whomsoever [*or as the case may be*], All and Whole [*here insert description of the lands as in the disposition or other deed, etc.*]; in virtue of which disposition [*or other deed, etc.*] the said lands were resigned in

the hands of the said *A. B.* [or "in the hands of *E. F.*, as his commissioner duly authorised, conform to commission" (*describe by date and other particulars*), "as in the hands of the said *A. B.* himself"] [or "in the hands of *E. F.*, being the known agent of the said *A. B.*, and as such duly authorised in virtue of the Act of the eighth and ninth years of the reign of Her Majesty Queen Victoria, chapter thirty-five, intituled 'An Act to simplify the form and diminish the expense of obtaining infeftment in Heritable Property in Scotland,' as in the hands of the said *A. B.* himself"], *ad perpetuam remanentiam*, and to the effect that the right of property of the foresaid lands and others might be united and consolidated with the right of superiority of the same in the person of the said *A. B.* in all time coming. Whereupon this instrument is taken by [or on behalf of] the said "*A. B.* and *C. D.*" in the hands of *etc.*, as in Sched. (J) to the end.

The Act of 1858 apparently did not require a warrant of registration to be written on a notarial instrument, or an instrument of resignation, but the Act of 1868 requires such warrant to be written on these instruments (s. 141).

Because of the provision of the Conveyancing Act, 1874, that it shall not be competent after the commencement of the Act for a superior to grant any charter, precept, or other writ by progress, the opinion is sometimes expressed that it is not now competent to consolidate a fee of property and a fee of superiority otherwise than by recording a minute of consolidation; but, as already indicated, it is thought that a superior purchasing the property fee can still consolidate it with his superiority fee in any of the ways competent to him prior to the commencement of the Act, and that one having feudalised titles to the superiority and the property fees can now use for consolidation either one of the methods competent to him before 1874, or a minute of consolidation. In other words, it is still competent, it is thought, to insert in a disposition of property in favour of the superior a procuratory or express clause of resignation *ad remanentiam*, or to execute a separate procuratory of resignation *ad remanentiam* for the purpose of either conveying the property to the superior or of consolidating fees of superiority and property, and to expedite an instrument of resignation *ad remanentiam* either in the form of Sched. (K) of the Act of 1868 or in the old common law form, with or without the long notarial docquet. For further information regarding consolidation, see CONSOLIDATION.

#### IV. ASSIGNATIONS OF PERSONAL TITLES TO LAND UNDER UNFEUDALISED CONVEYANCES; OF PERSONAL RIGHTS TO LAND IN THE SENSE OF SEC. 9 OF CONVEYANCING ACT, 1874; AND OF *JURA CREDITI* TO LAND.

In the preceding pages transmissions of feudalised fees, either of property or superiority, have been dealt with, and it has been shown that the habile mode of transferring them *inter vivos* is a disposition followed by infeftment; but a person may have, as opposed to a feudalised title to lands, (1) a personal title or right; (2) a personal right in the sense of sec. 9 of the Conveyancing Act, 1874; or (3) a right (*jus crediti*) to demand a conveyance of lands from the person who has a title, feudalised or unfeudalised, to them. Thus A., infeft, may grant and deliver a disposition of lands to B. Before B. takes infeftment he is said to have, in virtue of the disposition in his favour, a personal title or right to the lands, and this personal title he can transfer to another. He can transfer his personal title by granting an assignation thereof to any person. By the Conveyancing Act, 1874, it is declared that a personal right to every estate in land descendible to heirs (*i.e.* to heirs-at-law or of provision; *McAdam*,

1879, 6 R. 1256) shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed, and that such a personal right vested in an heir is transmissible in the same manner as a personal right to land under an unfeudalised conveyance (s. 9). But be it noted that although a personal right vested in an heir is so transmissible, yet the assignee of it must, before completing a feudal title to the lands carried by the assignation in his favour, present a petition under sec. 10 of the Act of 1874. Again, one may have neither a personal title nor a personal right in the sense of sec. 9 of the Act of 1874 to lands, and yet he may have a right to call on, *e.g.*, a trustee to grant a conveyance of lands which a truster has ordained to be conveyed to him. This right is usually called a *jus crediti*, and an assignation can be granted of it, the assignee's title to the *jus crediti* being completed by intimation of the assignation to the person under obligation to grant the conveyance. From a conveyancing point of view, there is this essential difference between an assignation of a personal title or right, or a personal right, in the sense of the Act of 1874, to lands on the one hand, and an assignation of a *jus crediti* to them on the other, that if an assignation of a personal title or right, or a personal right in an heir, is assigned separately to two or more persons, the assignee who first takes infeftment has a right to the lands to the exclusion of the other assignees (*Renton*, 1837, 16 S. 184; *affd.* 1843, 2 Bell's App. 214, 2 Ross' L. C. 435): but if a *jus crediti* is so assigned, the assignee who first duly intimates his assignation is preferred to the others.

1. *Transference of Personal Title to Lands under Unfeudalised Conveyances.*

Although before 1845 a person having a personal title to lands could transfer such right by a simple assignation of the unexecuted executive clauses contained in—*e.g.* to take the typical case—a disposition in his own favour, the usual form for transferring such personal right was then, and continued to be until 1858, a deed called a disposition and assignation granted by the person having the personal title in favour of another. The disposition and assignation before 1845 consisted of the following parts:—

- I. Narrative clause (*in which, however, the granter was designed as proprietor, not as heritable proprietor*).
- II. Dispositive clause.
- III. Obligation to infeft, followed sometimes by the words, "And for that purpose I" (*i.e.* the disponent or cedent) "hereby bind and oblige myself and my foresaids to make, subscribe, and deliver to the said B. and his foresaids all writs and deeds which may be necessary."
- IV. Clause of warrandice.
- V. Assignation of writs (this clause mentioning the disposition with the unexecuted procuratory of resignation and precept of sasine to which the disponent or cedent had right).
- VI. Assignation to the rents from a certain time.
- VII. Clause of warrandice of the assignation to writs and rents.
- VIII. Obligation to free the subjects of public burdens.
- IX. Clause of delivery of titles.
- X. Clause of registration.
- XI. Testing clause.

It will be noticed that the disposition and assignation in use before 1845 was similar in its terms to the ordinary dispositions then in use, with these exceptions: that it did not contain (1) a procuratory of resignation, or (2) a precept of sasine, and that it contained (3) an addition to the ordinary clause of assignation of writs to the effect that the disposition containing the open or unexecuted executive clauses—*i.e.* the procuratory of resignation and precept of sasine—was also assigned. The substance of the deed was the assignation in favour of the grantee of the unexecuted warrants to which the grantor had a personal title. The grantee under the deed could make up a title either by confirmation or by resignation—*i.e.* before 1845 he could take base infeftment on the precept of sasine assigned to him, and then get a charter of confirmation in his favour, or, in virtue of the procuratory assigned to him, get a charter of resignation, or it might be a charter of resignation and confirmation, and then take infeftment on the precept of sasine in such charter. It will be remembered that the Act 1693, c. 35, required that instruments of sasine or of resignation, if the granters or grantees of the precepts of sasine, or procuratories of resignation, which were the warrants for such instruments, were dead, had to deduce the title of those in whose favour infeftment was taken or resignation made.

The Act of 1845 made no change on the form of the disposition and assignation, but, as already stated, abolished instruments of resignation *in favorem*, allowed the deduction of titles required by the Act 1693, c. 35, to be made after the date of the Act in the charter of resignation, abolished the need for symbolical delivery in taking infeftment, and introduced a form of instrument of sasine which could be recorded at any time during the life of the person in whose favour it was expedite.

Owing to the provisions of the Lands Transference Act, 1847, the clauses of the disposition and assignation were in practice shortened, and the arrangement of them to some extent altered. After that Act the clauses of the disposition and assignation were: (1) Narrative clause; (2) dispositive clause; (3) term of entry; (4) obligation to infeft; (5) assignation to writs and delivery thereof; (6) assignation to rents; (7) obligation to free the subjects of public burdens; (8) clause of warrantice; (9) clause of registration; (10) testing clause. After the Act of 1847, which declared that a clause of assignation to writs in the form "And I assign the writs" should import an unconditional assignation, *inter alia*, to all open procuratories and precepts to which the disposer had right (s. 3), it was deemed unnecessary to insert in the clause of assignation of writs any special assignation of the disposition in favour of the disposer or the unexecuted executive clauses therein. The Act of 1847 made no change as regards infeftment on the part of the grantee of the disposition and assignation.

As already stated, it was quite competent even before the Titles to Land Act, 1858, to transfer a personal title or right to land by a simple assignation of the unexecuted executive clauses to which the cedent had right. This was settled by the case of *Routon* (cited *supra*), where it was held, *inter alia*, that an unexecuted procuratory of resignation might be as effectually carried by a general assignation of writs, titles, and evidents (where there was nothing in the deed containing it to exclude such a construction) as if specifically men-

tioned or described, and that the deed of assignation did not require to contain dispositive words, or profess directly to convey or make over the property of the lands themselves. Notwithstanding this decision, conveyancers were in the habit of using the disposition and assignation for transferring personal titles to lands at least until 1858, when the Titles to Land Act of that year gave statutory sanction to the use of an assignation, instead of the disposition and assignation, in the transference of personal titles to land. By the Titles to Land Act, 1858, it was made competent to any party in right of an unrecorded "conveyance" to assign the conveyance in forms prescribed by the Act, the assignation being either written on the conveyance assigned or apart from it (ss. 13 and 14). The provisions of this Act—which were extended to the transfer of unrecorded conveyances of subjects held burgage by the Titles to Land Act, 1860—did not, however, abolish the use of the disposition and assignation; but as its provisions were repeated with additions by the Titles to Land Consolidation Act, 1868, it is unnecessary to give further details regarding them.

Repealing the Titles to Land Act, 1858, the Titles to Land Consolidation Act, 1868, made provisions regarding assignations to unrecorded conveyances as well as notarial instruments in favour of parties having right to unrecorded conveyances. The Act made it competent to any person having right to an unrecorded "deed or conveyance," whether granted in favour of himself or originally granted in favour of another person, to assign the deed or conveyance, either (a) by granting an assignation written apart from the unrecorded conveyance in the form of No. 1 of Sched. (M) annexed to the Act; or (b) by granting an assignation written on the deed or conveyance itself in the form of No. 2 of Sched. (M), the assignation in both forms setting forth the deed or conveyance, and the title or series of titles, if any, by which the cedent acquired right to the same, and the nature of the right assigned (s. 22). Sched. (M), No. 1, with the note in the Act appended thereto, is as follows:—

I, A. B., in consideration of, *etc.* [*or otherwise, as the case may be*], hereby assign to C. D., and his heirs and assignees [*or otherwise, as the case may be*], the disposition [*or other deed, as the case may be*] granted by E. F., dated, *etc.*, by which he conveyed the lands of X., as therein described, to me [*or otherwise, as the case may be, specifying the connecting title, if any, and the nature of the right conveyed or assigned. State the term of the assignee's entry, and other particulars, if any, which ought to be specified.*] In witness whereof [*insert a testing clause in the usual form.*]

NOTE.—Before being presented for registration along with the disposition or other deed and warrant of registration thereon, the assignation must be docketed in or as nearly as may be in the form following, viz. :—

"Docketed with reference to warrant of registration on behalf of C. D., written on the said disposition [*or other deed, as the case may be.*]"

The docket shall be signed by the person or his agent or agents signing the warrant.

Sched. (M), No. 2, is in these terms:—

I, A. B., in consideration of, *etc.* [*or otherwise, as the case may be*], hereby assign to C. D., and his heirs and assignees [*or otherwise, as the case may be*], the foregoing disposition [*or other deed, as the case may be*] of the lands of X., as therein described, granted in my favour [*or otherwise, as the case may be, specifying the connecting title and the nature of the right conveyed or assigned. State the term of the assignee's entry and other particulars, if any, which ought to be specified.*] In witness whereof [*insert a testing clause in the usual form.*]

If an assignation, written in the form of Sched. (M), No. 1, is used,

the assignation (or, in the event of there being more than one, the successive assignations) may be recorded in the appropriate Register of Sasines along with the deed or conveyance itself,—*i.e.* the deed or conveyance which has been assigned,—and a warrant of registration thereon in the form of No. 2 of Sched. (H), the assignation being docketed with reference to the warrant of registration. If, on the other hand, an assignation in the form of No. 2 of Sched. (M) is used,—*i.e.* an assignation written on the conveyance,—the assignation or assignations may be so recorded, and the deed or conveyance, along with a warrant of registration thereon, the warrant being in the form of Sched. (H.), No. 1. The Act declares that the deed or conveyance, with the warrant of registration, and the assignation or assignations separate from the deed or conveyance and those written upon the deed or conveyance, if any, and all similar assignations granted before the commencement of the Act, being so recorded, shall operate in favour of the assignee on whose behalf they are presented for registration as fully and effectually as if the lands contained in the assignation, or, if there be more than one, in the last assignation, had been disposed by the original deed or conveyance in favour of such assignee, and the deed or conveyance, with the warrant of registration, had been recorded of the date of recording such deed or conveyance and assignation or assignations, *i.e.* shall operate as an infeftment of the assignee as at the date of recording (s. 22). The Acts of 1858 and 1860, whilst they contemplated the use of a docket in the case of assignations written apart from the deed assigned, did not specially provide that such dockets should be used; and to remove any doubts as to the validity of separate assignations without a docket, the Act of 1868 also provided that all deeds or conveyances, with a warrant of registration and assignation or assignations written thereon, or with an assignation or assignations separate therefrom, that may have been so recorded before the commencement of the Act, shall operate in favour of the assignees on whose behalf the same shall have been so recorded as effectually as the Act provides in regard to a recorded deed or conveyance with a warrant of registration and assignation or assignations written thereon, notwithstanding that such assignation or assignations may not have been docketed with reference to such warrant, or referred to therein as being so docketed (s. 22).

An assignee of an unrecorded conveyance is authorised by the Act of 1868 to take infeftment, not only by the modes set forth in the preceding paragraph, but also by (*a*) recording the deed or conveyance assigned with a warrant of registration, along with a notarial instrument, docketed with reference to the warrant of registration; or (*b*) by simply expeding and recording a notarial instrument. Thus, according to sec. 23, it is competent to any person having right to an unrecorded deed or conveyance originally granted in favour of another person (*a*) to expedite a notarial instrument in the form of Sched. (N), setting forth the deed or conveyance, and the title or series of titles by which he acquired right to the same, and the nature of his right, and to record the deed or conveyance, with warrant of registration thereon in the form of No. 2 of Sched. (H), and also the notarial instrument, in the appropriate Register of Sasines; or (*b*) where it is not desired to record the whole of the deed or conveyance, it is competent to expedite a notarial instrument in or as nearly as may be in the form of Sched. (J), setting forth generally the nature of the deed or conveyance, and containing those portions of it by which the lands in regard to which the instrument is expedite are conveyed, and by which real burdens, conditions, provisions, or limitations, if any, are imposed, and also setting

forth the title or series of titles by which the party acquired right to the deed or conveyance, and to record such notarial instrument in the appropriate Register of Sasines. Sec. 23 also provides that on the assigned deed or conveyance, with such warrant of registration thereon, and such notarial instrument in the form of Sched. (N), or any similar deed or conveyance, with warrant of registration and notarial instrument, expedite in virtue of any Act of Parliament repealed by the Act of 1868, being so recorded, or on such notarial instrument in the form of Sched. (J), or any similar instrument expedite in virtue of any Act of Parliament repealed by the Act of 1868 being so recorded, the person in whose favour the deed or conveyance, or the instrument, have or has been or shall be expedite and so recorded, shall be in the same position as if the original deed or conveyance had been granted to himself, and, along with a warrant of registration thereon, had been recorded of the date of recording the deed or conveyance or notarial instrument.

The Conveyancing Act, 1874, made no difference on the provisions of the Titles to Land Consolidation Act, 1868, with regard to assignments to unrecorded conveyances, or to the ways in which an assignee can take infeftment; but after 1874 the infeftment of the assignee in the lands implied entry with the superior, whereas infeftment of the assignee before the Act of 1874 did not imply entry unless the warrant of his infeftment proceeded from the superior.

It has already been stated that if a proprietor with a feudalised title disposes the same lands to two or more different *bond fide* disponees, the disponee who first takes infeftment is preferred, although the disposition in his favour should be of later date than the dispositions of the other disponee or disponees; and similarly, it is now settled that if a person having a personal title to lands assigns that title to two or more *bond fide* assignees, the assignee who first obtains infeftment is preferred (*Bell*, 1737, M. 2848, 2 Ross' L. C. 410, following *Brown*, 1676, M. 2844, and overruling *Erskine*, 1710, M. 2846; *Rule*, 1710, M. 2844; *Sinclair*, 1733, M. 2848; see also *Menzies*, 634; *Bell*, *Lect.* ii. 770). The principle in both cases is the same: that the first infeftment carries the real right out of the person who was last infeft. In *Bell* the facts were: O. obtained a decree of sale of a tenement in Kelso, and thereafter, in 1730, he, without having taken infeftment, conveyed the tenement by disposition containing a precept and the decree to C. C. took infeftment on this precept granted by O., and then, in 1732, granted to B. a heritable bond of relief, with a precept of sasine, in which B. was infeft. In 1734 G., a creditor of C., adjudged the tenement from C. and the decree of sale, and charged the superior, and obtained a charter from him, in which he was infeft. The Court held that G. had right to the lands, on the ground that he had first completed a real right to them; and since the decision in the case the principle has received effect that he who first completes the real right, or, in other words, he who first denudes the person last infeft, has the preferable right to the lands, and that therefore a cedent having a personal right to land is not divested thereof until infeftment in the person of his assignee has been taken. The remedy of a disponee of a feudalised right and of an assignee of a personal right, who have been ousted from obtaining a real right to the lands by a prior infeftment, is to fall back on the warrandice, express or implied, in their favour. In this connection, a case of interest regarding warrandice is *Dewar*,



1780, M. 16637. There J., infeft in lands, granted to G. a heritable bond over them, and then disposed them by disposition to A. A., without taking infeftment, sold, in 1756, the lands to D., with absolute warrandice. D. did not take infeftment in the lands; and in 1766 G. made his bond real against them. Having paid the sum due to G., D. raised action against his author, A.; and the decision of the Court was that by the obligation of warrandice A. was bound to clear the subject of the incumbrance of the heritable bond granted by J. to G., although A. was ignorant of its existence when he assigned his personal title to the lands to D.

2. *Assignment to Personal Rights to Lands in the Sense of Sect. 9 of the Conveyancing Act, 1874.*

The Conveyancing Act, 1874, declares that a personal right to every estate in land descendible to heirs shall vest, without service or other procedure, in the heir entitled to succeed thereto (s. 9). It is, however, not to be forgotten that even prior to 1874 titles of honour and dignities, and lands in Orkney and Shetland, and leases, vested without any service in an heir. This *ipso jure* vesting of a lease in an heir enables him not only to possess but also to transfer, or to sue a removing, or to challenge his predecessor's deeds; and it is thought that the provisions of the Registration of Leases Act, 1857, do not in any way prevent a long lease from vesting in the same way and to the same effect as a lease to which the Act does not apply (Rankine on *Leases*, 152).

Before 1874, lands belonging to an ancestor whose heir had not completed a title to them, were said to be *in hereditate jacente* of the ancestor, and the heir had to complete a title to them before he was in a position to grant a conveyance of them containing the means of investing his disponent in them at once. But it was not uncommon for an heir-apparent to dispose the lands to a purchaser before he had taken any steps to vest himself in the lands *in hereditate jacente* of his ancestor. Along with a conveyance of the lands the heir granted authority, either in the disposition or apart from it, to complete his own title (Menzies, 660). On receiving the conveyance the disponent either could complete his title by first taking infeftment on the disposition in his favour, and then getting a feudal title made up in the person of the heir, and by the latter step the infeftment in his own favour was validated *accretion*: or, alternatively, he could first make up a feudal title in the person of the heir, and then take infeftment under the disposition in his own favour. When an ancestor died with only a personal title to land, and his heir desired to transfer this personal right to a third party, the following method of transference was sometimes adopted before 1874, viz.: the heir granted an assignment of the unexecuted warrants in the ancestor's favour, and a mandate to his assignee to expedite a general service in his favour. After service was expedite in favour of the heir, the assignee could take infeftment by expediting and recording a notarial instrument, specifying the disposition in the ancestor's favour, the extract decree of general service in favour of the heir, and the assignment in his own favour, and then obtain entry by a charter or writ of confirmation; or he could, after service had been expedite, obtain a charter of resignation in virtue of the procuratory or clause of resignation in the ancestor's title, and take infeftment on the charter of resignation. But if he took infeftment in the former way, the decree of general service had to be deduced in the notarial instrument in accordance with the Act 1693, c. 35; and if he completed his title by charter of resignation, the decree had to be deduced

in the charter of resignation, to satisfy the requirements of the Infestment Act, 1845.

By the Conveyancing Act, 1874, "estate in lands" means any interest in land, whether in fee, liferent, or security, and whether beneficial or in trust, or any real burden on land, and includes an estate of superiority (s. 3 (2)), and sec. 9 of the Act declares a personal right to an "estate in land" vested in an heir to be of the like nature and attended with the like consequences, and be transmissible in the same manner, as a personal title to land under an unfeudalised conveyance.

The ways in which a personal title to land under an unfeudalised conveyance can be transferred have already been dealt with, and probably the transference of a personal right to lands, especially if that right be one in fee or liferent, will be, in practice, by a disposition or a disposition and assignation granted by the heir in whom it is vested in favour of the person to whom he transfers it. But whatever be the mode of transference, the deed will not entitle the disponent to complete without judicial procedure a real right to the lands. The assignee of the personal right will, in virtue of the deed in his favour, be entitled to present a petition under sec. 10 of the Act of 1874 to have it found that he is entitled to procure himself infest in the lands; and, on obtaining an extract decree in his favour, he can take infestment in the lands by recording it with a warrant of registration in his favour in the appropriate Register of Sasines (s. 10). For example, if A. had a personal right to lands in virtue of sec. 9 of the Act of 1874, and left a general disposition of his whole estate to trustees, the trustees could complete a title in their own persons by following the procedure prescribed by sec. 10 of the 1874 Act. The personal right vested in an heir by virtue of the provisions of sec. 9 of the Act of 1874 does not confer on him a title equivalent to an unfeudalised conveyance to the effect of enabling him, or his disponent or assignee, to take infestment without judicial procedure, *e.g.* by expeding and recording a notarial instrument, although an assignee having right to an unfeudalised conveyance has this power. Notwithstanding the provisions of the 1874 Act relating to *ipso jure* vesting in an heir, an heir, although he has a personal right to lands in the sense of sec. 9 of the Act, may, in transferring his interest in the lands, ignore this right, and grant, as before 1874, a disposition containing a mandate to his disponent to complete a title in his person, in which case the disponent will have it in his option either to complete a title by petition in terms of sec. 10 of the 1874 Act, or, alternatively, to make up a feudal title in the person of the heir by service or other procedure, the infestment in favour of the heir validating, as before 1874, any infestment which has been previously taken by the disponent, and making effectual, if the disponent has not already taken infestment, an infestment thereafter taken by him.

### 3. Assignations of Jura crediti to Lands.

The transference of personal titles to lands under unfeudalised conveyances, and of personal rights to lands in the sense of sec. 9 of the Conveyancing Act, 1874, having been dealt with, a few remarks fall to be added on the transmission of a *jus crediti* to lands. Where a trustee holds lands under an obligation to convey them to a beneficiary, or where a person buys heritage, *e.g.* by missives, or where a person comes under an obligation to convey lands to another, then the beneficiary, the buyer, or the obligee respectively, is said to have a *jus crediti* to the lands; or, in other words, whilst he has a right to insist on a conveyance of the lands in his

favour, he cannot complete a real right, *i.e.* a feudal title, to them "without the aid either of a third party or of the Court as fulfilling an obligation incumbent on such third party" (Bell, *Lect.* ii. 771). Such *jura crediti* are effectually transferred by the holders of them to others by assignations duly intimated to the obligors in the obligations which constitute them. "It is to be observed," says a well-known legal writer (M'Laren, 843), "that although a disponent of lands may transfer his personal *title* to another by merely assigning the disposition, yet a party who has a personal *right* to heritable property, *e.g.* a right to demand a specific conveyance of heritable subjects from the trustee, can only convey it effectually by using dispositive words, or such language as, according to the Land Transfer Statutes, is equivalent to a disposition in the old form." As a matter of practice, dispositive words are generally used in transferring a *jus crediti* to land, but it is thought that, just as a personal title to land under an unfeudalised conveyance could be before 1874, and can still be, assigned without the use of any particular words, including the word dispoise, so a deed transferring a *jus crediti* to lands did not before 1874, and does not, require to contain disposing words. All that is necessary in a deed purporting to transfer a *jus crediti* to lands is, it is thought, a clearly expressed intention to that effect. And if the holder of a *jus crediti* to lands grants a conveyance of them, as if he were infeft in them, it will receive effect as an assignation of his *jus crediti* (see *Paul*, 1835, 13 S. 818).

As already indicated, when such a deed is duly intimated, the cedent is divested of the *jus crediti*: and the intimation entitles the assignee to rank preferably to subsequent adjudging creditors (*Russell*, 6 Feb. 1824, F. C.: *Morrice*, 1846, 8 D. 918: and on intimation see *Paul*, *supra*: *Tod's Trs.*, 1869, 7 M. 1100: *Campbell's Trs.*, 1884, 11 R. 1078: *Jamieson*, 1887, 14 R. 643). But as the assignation does not communicate to the assignee a right capable of being completed by infeftment, he, to get a feudal title in the lands, requires to obtain a conveyance of them from the person who holds them under obligation to denude, or, in the event of his being unable to obtain a conveyance, to adjudge them (M'Laren on *Wills and Succession*, 846).

It must now be considered as settled that heritable property (*Heritable Reversionary Co. Ltd.*, 1891, 18 R. 1166: rev. 1892, 19 R. (H. L.) 43), and incorporeal personal rights (*Diagrall*, 1822, 1 S. 463: *Gordon*, 1824, 2 S. 675; and see *Heritable Reversionary Co. Ltd.*, *supra*) affected by a latent trust, though vested in a bankrupt by a title *ex facie* absolute, do not pass to the trustee in his sequestration: but a personal obligation to convey heritable estate undertaken by one who is the beneficial as well as the feudal owner does not denude him of his beneficial interest, or confer upon the person with whom it was contracted either the character or the rights of a trust beneficiary (see *Ld. Watson* in *Heritable Reversionary Co. Ltd.*, 19 R. (H. L.) at p. 51). Thus, suppose A. by missives binds himself to sell lands to B., and thereafter, before B. obtains a conveyance of the lands, he is sequestrated, the lands will vest in his trustee. But, on the other hand, if A. has a *jus crediti* to lands, and he assigns it to B. by duly intimated assignation, the lands will not vest on A.'s bankruptcy in his trustee. Accordingly in *Edmund* (1855, 18 D. 47: affd. 1858, 3 Macq. 116: and comp. *Strachan*, 1776, M. App. Adj. No. 7, 2 Ross' L. C. 480: and *Macgregor*, 1843, 5 D. 888, 2 Ross' L. C. 489, as commented on in *Watson*, 1868, 6 M. 258), where, under articles of roup which contained the usual obligation on the exposor to dispoise to the purchaser, B. feued lands from

the exposor, A., who executed a charter in B.'s favour. The lands, after various transmissions, came into the hands of N., who, after infeftment in them, granted over them a bond and disposition in security in favour of O. and P., who recorded it in the Register of Sasines. N. thereafter became bankrupt, and the trustee on his sequestrated estate, having discovered that, owing to defects in the charter granted in favour of B., no real right in the lands had ever been constituted since the lands were acquired by B. under the articles of roup, sued the successors of the exposor, A., to grant a valid charter in his favour as trustee. O. and P., the creditors under the bond, maintained that their right to the lands under the bond in their favour was preferable to that of N.'s trustee, and the judgment of the Court of Session and of the House of Lords was that the trustee could not obtain a charter except under burden of the bondholders' O. and P.'s preferable right, in respect (1) that under the articles of roup and the charter, the bankrupt had a *jus obligationis* or *jus crediti* to obtain a personal title to the lands in a form admitting of its being feudalised by infeftment; (2) that this *jus obligationis* or *jus crediti* was carried by the assignation to writs in the bond and disposition in security granted by N. in favour of O. and P.; and (3) that the registration of the bond in the Register of Sasines was equivalent to intimation of that assignation to the exposor, A., or his successors. In the House of Lords Lord Cranworth, in discussing whether the right of the bankrupt in the lands was a *jus ad rem* or a *jus crediti* (3 Macq. 122), remarked: "I must confess that upon this subject I think there is a great deal of doubt and obscurity, from the want of anything definitely explaining the distinction between *jus ad rem* and *jus crediti*, because I think I find that these words have been used in many cases interchangeably, without any clear distinction of the one from the other; but there may be this practical distinction, that the *jus ad rem* is a right which the person possessing it may make a complete right by his own act, or by some act which he may compel another without a suit to perform; whereas a *jus crediti* may be defined to be a right which the holder of it cannot make available, if it is resisted, without a suit to compel persons to do something else in order to make the right perfect. Either, therefore, I think there is no distinction between the two things, or, if there is a distinction, it is within the latter description, that of *jus crediti*, that this case comes, and neither Nicol" (*i.e.* the bankrupt) "nor the bondholders could have obtained a valid feudal infeftment under any existing charter."

Although a person, who has granted an unrecorded back bond or declaration of trust acknowledging that he holds heritage in trust, has an unqualified feudal title, such heritage does not pass to his trustee in bankruptcy, yet an *ex facie* absolute disponee can give an unimpeachable title to an onerous and *bonâ fide* alienee in respect of the well-known principle that if a true owner chooses to conceal his right from the public, and to clothe his trustee with all the indicia of ownership, he is thereby barred from challenging rights acquired by innocent third parties for onerous consideration under contracts with his fraudulent trustee. It seems to follow, from the decision in the case of the *Heritable Reversionary Co. Ltd.*, that if a bankrupt, infeft or uninfeft in property, transfers it by a disposition or assignation, as the case may be, to a third party, and becomes bankrupt before such party has obtained a real right in the land, the trustee on his sequestrated estate is not entitled to the property for behoof of the general body of creditors.

**Disposition in Security.**—See **BOND AND DISPOSITION IN SECURITY.**

**Disposition Omnium bonorum.**—A disposition *omnium bonorum* is the deed whereby a debtor in cessio makes over his whole estate to a trustee for behoof of his creditors. Under the law prior to the Debtors Act, 1880, the granting of such a disposition was the condition on which a debtor was entitled to apply for protection against personal diligence and imprisonment. While cessio, as a process for obtaining such protection, is virtually obsolete, owing to the abolition by the Debtors Act of imprisonment for civil debt in all ordinary cases, the disposition *omnium bonorum* takes its place in modern processes of cessio, as the means whereby the debtor is completely divested of his estate for distribution among his creditors. The Sheriff's decree granting a petition for cessio, either at the instance of the debtor or of a creditor, ordains the debtor to grant a disposition *omnium bonorum* to a trustee named therein. While an award of sequestration is a complete adjudication of the bankrupt's property in favour of the trustee, a decree granting cessio operates as a transfer of the bankrupt's moveable estate only (43 & 44 Vict. c. 34, s. 9 (5)), and the disposition *omnium bonorum* is required to give the trustee a title to the heritable estate. Thus, he has no title without it to challenge, under the Bankruptcy Statutes, a conveyance of heritage by way of illegal preference to a favoured creditor (*Thomas*, 5 M. 198). It implies and confers a power of sale of the whole estate (*Clark*, 1890, 17 R. 1064). The disposition *omnium bonorum* must be in the form of Sched. A annexed to the Debtors Act, 1880. It does not require a stamp (43 & 44 Vict. c. 34, s. 11). The expense falls to be paid out of the readiest of the funds thereby conveyed (*ib.* s. 9 (6)). See **CESSIO.**

**Disqualification of Judge.**—See **DECLINATURE.**

**Disqualification of Voter.**—See **FRANCHISE; CORRUPT AND ILLEGAL PRACTICES.**

**Dissenting Churches.**—See **VOLUNTARY CHURCHES.**

**Dissolution of Parliament.**—Parliament is dissolved by the exercise of the royal prerogative or by efflux of time. When Parliament is sitting it may be dissolved by the sovereign in person or by commissioners appointed by the sovereign. If Parliament is prorogued, the royal will is expressed by royal proclamation. The modern practice is to prorogue Parliament and thereafter dissolve it by royal proclamation. It is also in accordance with modern practice to include in the proclamation dissolving Parliament a declaration of the royal will to call a new Parliament, a statement that an Order in Council has been addressed to the Chancellors of Great Britain and Ireland to issue the necessary writs, and an order on the Chancellors to issue these writs. The Order in Council is made the same day. Parliament, if not sooner dissolved by royal prerogative, expires by efflux of time at the end of seven years, by virtue of the Septennial Act, 1 Geo. I. St. 2, c. 38.

**Dissolution of Partnership** —See PARTNERSHIP.

**Districts.**—A county is divided by the county council into districts, for the purposes of the management and maintenance of highways and the administration of the laws relating to public health. Each district must comprise a group of electoral divisions, and each parish, so far as within the county, must be included in one district. The division of a county into districts is not made where it appears to the county council unnecessary or inexpedient, in the case of a county containing fewer than six parishes, or which had not been divided into districts for the purposes of the management and maintenance of highways prior to the passing of the Local Government Act, 1889 (Local Government Act, 1889, s. 17 (1), s. 16 (1), s. 77). A county council may divide a county into police districts, consisting of such parishes and places, or parts of parishes and places, as appears to them most convenient. Police districts may be altered by the county council; but the division into districts, or alteration of districts, must be approved by the Secretary for Scotland. By Order in Council a county council may be required to constitute police districts in the county (Police Act, 1857, ss. 58, 59, 60; Local Government Act, 1889, s. 97). See DISTRICT COMMITTEE; ROADS AND BRIDGES; PUBLIC HEALTH; CONSTABLE; POLICE.

*DISTRICT—SPECIAL DRAINAGE—SPECIAL WATER.*—Upon a requisition in writing by not fewer than ten inhabitants of the district, the local authority may form part of their district into a special drainage district or a special water supply district. The decision of the local authority may be appealed to the Sheriff, who may find that no special district should be formed, or may enlarge or limit the special district, or he may find that a special district should be formed, and may define the limits thereof (Public Health Act, 1867, ss. 76, 89 (5)). [Objections by ratepayers to formation of special district (*Ratepayers of Leuchars*, 1894, 1 S. L. T., p. 516).] On a requisition from ten inhabitants of a district, the local authority may meet for the purpose of considering the propriety of altering a district. Alterations may be made (1) by enlarging or limiting the boundaries; (2) by combining two or more such special drainage districts; (3) by enlarging or limiting the said boundaries, and combining two or more such special drainage districts or special water supply districts, or portions thereof. The Sheriff has the same powers as in regard to the formation of districts (Public Health (Scotland) Act, 1882, s. 3). [Local authority's power to include within a special district lands situated outside (*Maconochie Welwood*, 1894, 22 R. 56).] [Inclusion of lands on which no person resided, and where benefit to be derived not commensurate with taxation (*Helmsdale Local Authority*, 1893, 1 S. L. T., p. 242).]

Where a special drainage district or special water supply district has been formed in any parish, the district committee may appoint a sub-committee for the management of the drainage or water works, which "shall in whole or in part consist of parish councillors of the parish or parishes in which the special district is situated, whether members of the district committee or not," and the number of the sub-committee, failing agreement, may be determined by the Secretary for Scotland (Local Government Act, 1889, s. 81, as amended by Local Government Act, 1894, s. 44 (9)). Where the district is partly within a county and partly within a burgh or police burgh, the management is in the hands of the sub-committee, along with "such number of the town council or police commissioners (as the

case may be) of such burgh or police burgh as, failing agreement, the Secretary for Scotland may determine" (Local Government Act, 1889, s. 81 (1) (2) (3)). [Reduction of Secretary for Scotland's order (*Dumbarton County Council*, 1893, 21 R. 12).] [Management of special water supply district partly in county and partly in burgh (*Dumbarton County Council*, 1894, 22 R. 64).] Again, where the special district is wholly within a police burgh formed after the passing of the Local Government Act, the police commissioners become the local authority for such special district, the assessments, however, being levied as formerly (Local Government Act, 1889, s. 76). Where a special drainage or water supply district exists, such district will be liable for its own special assessment (Local Government Act, 1889, s. 17 (4)), and will be exempt from the general drainage or water supply assessment, as the case may be (Local Government Act, 1889, ss. 94, 95). Where a special district is wholly within a police burgh formed after the passing of the Local Government Act, the Police Commissioners become the local authority therein, and levy the assessments in the same manner as they were levied before the burgh was formed (Local Government Act, 1889, s. 81 (3)). See PUBLIC HEALTH.

*SPECIAL DISTRICTS FOR SANITARY PURPOSES.*—On the written requisition of one or more parish councils, or of not fewer than ten parish electors of any landward parish or district, a district committee (or county council sitting as a district committee) may form the district specified in the requisition into a special district for all or any of the following purposes (Local Government Act, 1894, s. 44):—

1. *Lighting.*—The district committee may adopt for that purpose all or any of secs. 99 to 105 inclusive of the Burgh Police (Scotland) Act, 1892 (55 & 56 Viet. c. 55). These sections deal with the public lighting of the special district by the district committee, the exaction of penalties for wilfully breaking lamps, the recovery of damage for accidental breakage, arbitration as to the price to be charged for light by any company supplying it, the testing of gas, and the lighting of common stairs, courts and passages, and private courts. If a special lighting district is formed, the district committee may adopt the Burghs Gas Supply (Scotland) Act, with the necessary adaptations, and subject to the provisions, of the Local Government Act, 1889, with respect to capital expenditure, borrowing and audit. The object of doing so is to enable the district committee to purchase or erect gasworks and supply gas (Local Government Act, 1894, c. 44, s. 10).

2. *Scavenging and Removal of Dust, Ashes, and Refuse.*—The district committee may adopt for that purpose all or any of secs. 107 to 127 inclusive of the Burgh Police (Scotland) Act, 1892. These sections deal with the removal and disposal of refuse; the erection of public conveniences; the watering of streets; the employment of scavengers, and the imposition of penalties for obstructing them or acting in place of them; the cleansing of common stairs and passages, foot-pavements, areas, stables, byres, and dungsteads; the infliction of penalties for keeping unclean houses; the deposit and removal of dung; the imposition of penalties for conveying offensive matter at improper times; the construction of ashpits; the removal of privies, ashpits, cesspools, and middens; the conversion of privies into water-closets; the maintenance or removal of urinals attached to public-houses, etc.; and the making of by-laws (Local Government Act, 1894, s. 44 (6)).

3. *The Provision and Maintenance of Public Baths or Bathing Places, Wash-houses, and Drying-Grounds.*—The district committee may adopt for that purpose all or any of secs. 309 to 314 inclusive of the Burgh Police

(Scotland) Act, 1892. These sections relate to the acquisition and sale of such places, their management, the charges to be made, and the method of recovering these charges, the making and publication of by-laws, etc. When any sections of the Burgh Police Act are adopted, the necessary adaptations require to be made in accordance with the provisions of the Fourth Schedule to the Local Government Act, 1894. Special districts can only be formed in the rural part of the county; the urban portions already come under the Burgh Police Act. On the requisition being received, the district committee must meet to consider it after twenty-one days' clear notice. They may approve or disapprove of the formation of a special district for all or any of the purposes stated in the requisition. If they disapprove, the question cannot be raised again for twelve months. If they approve, they define the boundaries, and declare which of the above-mentioned sections of the Burgh Police Act are to apply. A copy of their resolution must in every case be published in a local newspaper, and transmitted to the Board and to the county council. The resolution of the district committee is final, unless the proposed special district comprises the whole or part of an existing special drainage or water supply district (Local Government Act, 1894, s. 44 (2)). In such a case the special district cannot be formed without the county council's consent, and in judging of the matter the county council is specially directed to take into consideration the amount of the rates already levied within the proposed special district under the Act of 1889 and the Public Health Acts (Local Government Act, 1894, s. 44 (3)). The county council may refuse consent, or may consent to the resolution with or without modifications. The district committee may alter the area of a special district, or combine two or more special districts by resolution duly made, with or without requisition (Local Government Act, 1894, s. 44 (5)). The expenses of formation and management are met by a special district rate levied within the special district as an addition to the public health rate. It must not exceed 9d. per £ of the poor law valuation (Local Government Act, 1894, s. 44 (6)). To manage the special districts above mentioned, the district committee may, subject to regulations made with the county council's consent, appoint annually a sub-committee, consisting wholly or partly of parish councillors of the parishes concerned, whether they are members of the district committee or not (Local Government Act, 1894, s. 44 (8)).

**District Committee.**—A district committee is the body which administers in the districts into which counties are divided for the purposes of the management of roads and public health.

*Provisions applying to all District Committees.*—A district committee consists of the county councillors for the electoral divisions comprised in the district, together with one representative from the parish council of each parish comprised or partly comprised therein, and one representative of each burgh within the meaning of the Roads and Bridges (Scotland) Act, 1878, where the management and maintenance of the highways within the burgh have, under the provisions of the last-mentioned Act, been transferred to the county. In the case of parishes partly landward and partly burghal, the representative from every such parish shall be a ratepayer within the meaning of the Local Government Acts (Local Government Act, 1889, s. 78). The representatives of parish councils and burghs are appointed by their respective boards and town councils, and they hold office until the appointment of their successor is intimated. The appointment of a member of a



district committee, when made, is intimated to the county clerk and the clerk of the district committee. Where a county is not divided into districts, the powers, duties, and liabilities of a district committee devolve upon the county council, and for the purpose of the management of highways and public health a representative of each parish council and burgh, as above provided, are deemed to be county councillors (Local Government Act, s. 78 (3)). The representative from a parish council, elected to sit on a district committee, must be a member of the parish council which elects him (Local Government Act, 1891, s. 39 (7)). A woman, married or unmarried, may represent the parish council on the district committee or county council (Local Government Act, 1894, s. 20 (3)).

A district committee is designated according to the district within which it acts, and it may sue and be sued under that designation (Local Government Act, 1889, s. 79). A district committee may act notwithstanding any vacancy upon it. It may elect a chairman, who has a casting and deliberative vote (Local Government Act, 1889, ss. 74, 80). It may also appoint a district clerk and district treasurer, and, subject to the approval of the county council, may fix their salaries (Local Government Act, 1889, s. 80); but the salaries of these officials are paid by the county council (Local Government Act, 1889, s. 83 (6)). For the purpose of the regulation of its quorum and proceedings, a district committee is a committee of the county council (Local Government Act, 1889, s. 80). The county council may make, vary, and revoke regulations respecting the quorum and proceedings of the committee; but, subject to such regulations, the proceedings, quorum, and place of meeting, whether within or without the county, shall be such as the committee may from time to time direct. A district committee, unless forbidden by the county council regulations, may appoint committees of its own number (41 & 42 Vict. c. 51, s. 24 (8), and 39 & 31 Viet. c. 101, s. 7). They may also appoint joint-committees with any parish council or parish councils, and county council or councils, or district committees or town councils or burgh commissioners (Local Government Acts, 1889, s. 76, and 1894, s. 34).

Sums required for district purposes are obtained from the county council (Local Government Act, 1889, s. 75). Sums passed by the county council to the account of any district committee must be paid into an account kept in the name of the district committee with an incorporated or joint-stock bank (including any branch thereof), for that purpose appointed by the county council; and all cheques on such account must be signed by two members of the district committee nominated for that purpose by the committee, and be countersigned by the district clerk (Local Government Act, 1889, s. 82). The accounts of the district committee must be made up and balanced to the 15th of May in each year, and are duly audited (Local Government Act, 1889, ss. 68, 70).

*District Committee for Purposes of Management of Roads and Bridges.*—The committee for this purpose includes (a) all the county councillors for the electoral divisions within the boundaries of the district, except those who represent police burghs of which the population has for this purpose been ascertained to exceed five thousand; (b) one representative (being a ratepayer under this Act) from the parish council of each parish wholly or partly comprised in the district; and (c) a representative of each burgh which has devolved the management of its highways upon the county council. Burgh members of the committee are not entitled to vote on matters involving expenditure to which such burgh does not contribute, and

for which it is not assessed (Local Government Act, 1889, s. 73 (8)). A woman, married or unmarried, may represent the parish council on the district committee (Local Government Act, 1894, s. 20 (3)). For district administration in the management of roads and bridges, see ROADS AND BRIDGES.

*District Committee for the Purposes of Public Health.*—The district committee for this purpose is composed of all the county councillors for the electoral divisions within the district, except those elected to represent police burghs. It also includes one representative (a ratepayer under the Local Government Act, 1889) from the parish council of each parish wholly or partly comprised in the district. Burgh members of the committee are not entitled to vote on matters involving expenditure to which such burgh does not contribute, and for which it is not assessed (Local Government Act, 1889, s. 73 (8)). A woman, married or unmarried, may represent the parish council on the district committee (Local Government Act, 1894, s. 20 (3)). For district administration in the management of public health, see PUBLIC HEALTH.

**Dividend.**—See JOINT STOCK COMPANY; SEQUESTRATION; CESSIO BONORUM.

**Dividend Warrants.**—By sec. 95 of the Bills of Exchange Act, 1882, the provisions of the Act relating to crossed cheques (ss. 76–82) apply to warrants for payment of dividends. See CHEQUES.

**Division and Sale, Action of.**—The right of joint owners of heritable property, such as joint disponees, adjudgers, and heirs-portioners, to sue for division, or alternatively for sale, of the subjects, is traceable to the *actio communi dividundo* of the Roman law. “That law and our common law following upon it proceed upon the principle that no one should be bound to remain *in communione* with another or others as proprietors of common property: that for reasons of public policy, and especially to ensure the advantageous management of such property, any joint proprietor should have it in his power, against the will of the others, to put an end to the communion; and that there arises out of the situation itself an obligation to divide, or, where division or any other arrangement is impracticable consistently with retaining the property, to adjust their respective interests by sale, and division of the price” (Ld. Rutherford in *Broek*, 1851, 19 D. 701). The procedure used formerly to be by brief of division directed to the Sheriff, and tried by him and a jury. It was not retournable to Chancery (see BRIEF). This has now been superseded by the action of declarator and division, or sale where it is impossible or undesirable that the subjects should be divided. Any joint *pro indiviso* owner may raise the action. He cannot be compelled to show cause for his demand (*Frizell*, 1860, 22 D. 1176). The defenders are the other *pro indiviso* proprietors. The fact that one of the *pro indiviso* owners holds in trust does not affect his right to sue for division, nor for sale, even although there is no power of sale in the deed under which he acts. It is not an exercise of a power of sale, but merely an act of administration (*Craig*, 1863, 1 M. 612). But trustees who hold heritable subjects cannot, along with some of the beneficiaries, bring an action of division against the other beneficiaries

unless the trust has failed, and the beneficiaries are absolutely entitled to be rid of it. The proper remedy is an application for authority to sell under the Trusts Acts (*Kennedy and Tullis*, 1885, 12 R. 1026).

The action must be brought in the Court of Session unless the value of the subjects in dispute does not exceed £50 per annum, or £1000 in all, in which case the action may competently be raised in the Sheriff Court of the county in which the property is situated (40 & 41 Vict. c. 50, s. 8 (3)). If the property lies partly within two Sheriff Court jurisdictions, there is apparently no power in the Sheriff Court of either to entertain the action. In the Court of Session the procedure takes place before the Lord Ordinary. It is not an Inner House action, as it does not involve any exercise of the *nobile officium* (*Anderson*, 1857, 19 D. 700, and *Brock*, *supra*). For forms, see *Juridical Styles*, iii. 45, 46, and Dove Wilson, *Sh. Ct. Pr.* 402. The first interlocutor finds the libel relevant. Whether the action is defended or not, a remit is made to a practical man (usually an architect) to report on a scheme of division. Objections and answers to the report may be lodged, and the parties may be heard upon the scheme. When the parties cannot agree which share each is to take, the matter is usually settled by lot. The division may be effected by means of mutual conveyances, or recourse may be had to the provisions of the Conveyancing Act, 1874, s. 35, which provides that a decree of division, whether pronounced by the Court or by arbiters, or an oversman, is equivalent to an unrecorded conveyance, and may be used as such for the completion of title.

As alternative to the action for division, a conclusion for sale may be added when the subjects are such that actual division is either impossible or would be attended with great loss. In such circumstances the summons concludes for judicial sale and division of the proceeds. Even although the subjects are not physically incapable of division, yet if division would be injurious to the interests of the parties, by reducing the market value of their shares, they may insist for sale and division of the proceeds (*Thom*, 1875, 3 R. 161). Power to the *pro indiviso* owners to bid at the sale may be reserved in the articles of roup (*Thom*, *supra*). It is usual to appoint the sale to proceed at the sight of the Clerk of Court upon articles of roup to be adjusted at his sight. In the articles of roup the proprietors should be taken bound to execute a disposition to the purchaser, which should be lodged in process. If any difficulty is likely to arise in getting the signatures of the proprietors, it is prudent to introduce into the summons a conclusion for adjudication of the subjects to the purchaser, decree in terms of which will give him a good title. But such a conclusion cannot be added by way of amendment.

The share of heritable estate belonging to an absent person may be sold under the conditions contained in the Presumption of Life Limitation (Scotland) Act, 1891, s. 4. If that Act is inapplicable, and it is desired to sell a property in which an absent person has a joint interest, a factor *loco absentis* may be appointed to him, and made the defender in any action of division and sale. The sale will have the effect of converting the succession from heritable to moveable (*Macfarlane*, 1895, 22 R. 405).

Moveable property held *pro indiviso* may also be divided and sold at the instance of any of the *pro indiviso* proprietors (Stair, i. 16. 4; Ersk. iii. 3. 56).

The process of division may also be used for the division of a commony (see COMMONY).

[See Stair, i. 16. 4, iii. 8. 11, iv. 3. 12; Ersk. iii. 3. 56, iii. 8. 13; Bell, *Prin.* s. 1079; Shand *Practice*, 604; Mackay, *Practice*, ii. 306; *Manual*, 504;

Coldstream, *Procedure*, 121; Dove Wilson, *Sh. Ct. Pr.* 399; Rankine, *Landownership*, 515; Bell, *Conveyancing*, ii. 831.]

**Division and Sale (Sheriff Court).**—Actions of (*A*) division of commonalty, and (*B*) division, or (*C*) division and sale of common heritable property, are competent in the Sheriff Court of the county in which the common property is situated, where the value of the “subject in dispute,” *i.e.* the common property to be divided, does not exceed the sum of fifty pounds by the year or one thousand pounds value (Sheriff Courts Act, 1877, 40 & 41 Vict. c. 50, s. 8 (3)).

In any question as to the value of the subject in dispute, the Sheriff is directed to inquire into and determine it in such way as he thinks expedient, and his determination is final as regards the competency of bringing the action in the Sheriff Court (*ib.* s. 10).

Such actions, at any time before, or not more than six days after, the closing of the record may be removed to the Court of Session after, and to proceed in, the manner described in APPEAL TO COURT OF SESSION FROM SHERIFF COURT (*Removal of Process under the Act of 1877*) (*q.v.*). These actions, if sued to judgment in the Sheriff Court, may be appealed to the Court of Session in the ordinary way, whether over twenty-five pounds in value or not (Act of 1877, s. 9 (3)).

#### (*A*) DIVISION OF COMMONTY.

This action in the Court of Session, and also in the Sheriff Court, is based on the Act 1695, c. 38; and in the Court of Session the procedure is regulated by the A. S. 18 June 1852. The procedure in the Sheriff Court is that of an ordinary action, subject to the modifications noted above, and should follow the provisions of the said A. S., so far as these are applicable to an ordinary Sheriff Court action. The petition, being in the ordinary form of the Sheriff Courts Act of 1876, will not, like the summons in the Court of Session action, detail the various steps of procedure, but will confine itself to asking for the state of matters which it wishes to bring about. It asks the Sheriff to order the defenders to exhibit and produce their titles, to declare that the pursuer is entitled to raise the action, and that the commonalty should be divided according to the respective rights of the parties, to divide it accordingly, and to apportion the expenses among the parties (A. S. 18 June 1852).

The condescendence must describe the commonty, in reference to a plan, should set forth its value, and must set forth the interest and title of the pursuer, and the claim he proposes to advance (*ib.* ss. 1, 2, 3). The defences set forth the interests and titles of the defenders, and the claims which they propose to advance (*ib.* s. 4).

Having considered what proof should be allowed, the Sheriff remits, with such instructions as he thinks necessary, to a man of skill (see *Bruce*, 1883, 11 R. 192) to prepare a scheme of division, to which the parties may lodge objections and answers. On a consideration of these, if parties cannot agree, the matter is again remitted to be finally adjusted.

The decree has the effect of mutual conveyances between the parties, and an extract may be recorded in ordinary form in the Register of Sasines (Conveyancing Act, 1874, 37 & 38 Vict. c. 94, s. 35).

#### (*B*) DIVISION.

This is an ordinary action, and is the form used by a *pro indiviso* owner, who is one of two or more joint proprietors of heritable

property, and is desirous of having it divided. The petition is analogous to that of an action of division of commony (*supra*) (see *Juridical Styles*, 3rd ed., iii. p. 49), omitting, as in the case of division of commony, the call for the various steps of procedure. Where the joint-proprietors (who must all be called) cannot agree, the action proceeds by remit to a man of skill to prepare a scheme, to which objections may be lodged, and answers allowed, if wanted, and then decree follows. Extract of the decree being recorded, operates as a conveyance (37 & 38 Viet. c. 94, s. 35).

Where, from the nature of the subjects, division is impracticable, or, where practicable, would result in depreciation, the form the action takes is that of

(C) DIVISION AND SALE,

which is similar to the action of division, with the addition of a conclusion for judicial sale and division of the proceeds. The incapability or inadvisability of dividing the subjects must be averred, and, where the other proprietors appear and object, or do not appear at all, must be proved (*Bryden*, 1837, 15 S. 486; *Anderson*, 1857, 19 D. 700; *Thom*, 1875, 3 R. 161; *Bell*, *Lectures on Conveyancing*, 3rd ed., p. 831; *Jurid. Styles*, 3rd ed., iii. p. 46).

[*Dove Wilson*, *Practice*, 399–403; *Mackay*, *Manual*, 501–5; *Bell*, *Dictionary*.]

**Division, Benefit of.**—See BENEFICIUM DIVISIONIS.

**Divorce.**—*DEFINITION.*—Divorce consists in the severance of the bond of marriage by the decree of a competent Court (see A VINULO; A MENSA ET THORO). An action of divorce as a CONSISTORIAL ACTION (*q.v.*) is, in Scotland, competent only in the Court of Session.

*GROUND*S OF.—There are in Scotland two grounds of divorce, namely, ADULTERY (*q.v.*) and DESERTION (*q.v.*). Upon proof that either the husband or the wife has committed one or other of these matrimonial offences, decree of divorce will be pronounced.

*TITLE TO SUE OR DEFEND.*—The action cannot be raised except by the innocent spouse, and cannot, it is thought, be continued by the heir or representative if the injured spouse die during its course (*Bell*, *Prin.* 1534; *Fraser*, *H. & W.* ii. 1145; see *Clement*, 1762, M. 337; *Monzie*, 21 Nov. 1835, F. C., and 14 S. 47; *Ritchie*, 1874, 1 R. 826). But if the innocent spouse die after having obtained decree in the Outer House, his representatives, having a patrimonial interest, may be sisted and allowed to defend the judgment (*Ritchie*, *ut supra*). The action may be defended by any person having a patrimonial interest, *e.g.* creditors, or by the Lord Advocate (24 & 25 Viet. c. 86, s. 8; *Ralston*, 1881, 8 R. 371; *Paul*, 1896, 4 S. L. T. No. 260; *Greenhill*, 1822, 1 S. 296; *affd.* 1824, 2 Sh. App. 435; and see COLLUSION), or by the children or next of kin of the defender (24 & 25 Viet. c. 86, s. 10). The action is incompetent at the instance of a lunatic (*Thomson*, 1887, 14 R. 635). It was held, in England, that an action for divorce was competent against an insane defender with a guardian *ad litem*, if the offence was committed before the insanity began. But this ease turned mainly upon the construction of the English Divorce Act (*Mordaunt*, 1874, L. R. 2 Sc. App. 374).

*PRACTICE IN ACTIONS OF DIVORCE.*—The marriage must first be proved

(Fraser, *H. & W.* ii. 1148; *Lacy*, 1869, 7 M. 369). Where the husband is pursuer and the ground is adultery, the paramour may be called as CO-DEFENDER (*q.v.*). The parties are competent and compellable witnesses, but "no witness shall be liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless such witness should have already given evidence in the same proceeding in disproof of his or her alleged adultery" (37 & 38 Viet. c. 64, s. 2; see *Cook*, 1876, 4 R. 78; *Bannatyne*, 1886, 13 R. 619; *Hunt*, 1893, 1 S. L. T. No. 210). Evidence must be led (11 Geo. IV. and 1 Will. IV. c. 69, ss. 33 and 36). Where pursuer or defender is absent from the jurisdiction, he or she may be required to sist a mandatory. But in many cases the Court would not require this (*Campbell*, 1854, 17 D. 514; *D'Ernesti*, 1882, 9 R. 655). Where the defender has been cited as a witness, or appointed to appear for identification, and is not present at the proof, it is a common but not invariable practice to allow a photograph to be shown to the witnesses (*L. v. L.*, 1890, 17 R. 754; *Cussidy*, 1893, 1 S. L. T. No. 380). Where no defences have been lodged, a defender has nevertheless been allowed to appear at the proof (*Paterson*, 1848, 20 Sc. Jur. 459; *Watts*, 1885, 12 R. 894); and a special defence has been allowed to be lodged even after the proof, but before decree (*Paul*, 1896, 4 S. L. T. No. 193).

[See CONSISTORIAL ACTIONS; CO-DEFENDER; and *infra* as to *Evidence of Adultery and Desertion*.]

1. *ADULTERY*.—Prior to the Reformation, divorce was granted only A MENSA ET THORO (*q.v.*). Since 24 August 1560, divorce A VINCULO (*q.v.*) has been granted in Scotland (Fraser, *H. & W.* ii. 1139). This change was not at first introduced by Statute;—it was a result of altered views of marriage;—but it was confirmed and established by the Act 1573, c. 55, which introduced divorce for desertion (see per Ld. Watson in *Collins*, 11 R. (H. L.) at p. 32, and argument in *Purres' Trs.*, 1895, 22 R. 513).

*Defences*.—In addition to denial of the fact of adultery, the following defences are recognised: 1. COLLUSION (*q.v.*). 2. CONDONATION (*q.v.*). 3. Long delay in raising the action (see CONDONATION). 4. LENOCINIUM (*q.v.*). 5. The *bonâ fide* belief that the intercourse alleged to be adulterous was lawful, as where, *e.g.*, a wife enters into a second marriage in the reasonable belief that her first husband is dead. It is not finally settled by an Inner House judgment if the last is a good defence, but the better opinion appears to be that it would be so regarded (see *Thomson*, 9 Dec. 1836, F. C.; *Donald*, 1863, 1 M. 741; *McDonald*, 1842, 1 Broun, 238; *McKenzie*, *Crim. Law*, p. 179; Fraser, *H. & W.* i. 138, and ii. 1143; Mackay, *Manual*, 484; but see *Ersk.* 1. 6. 44). But the *bonâ fides* must arise from an error as to fact and not as to law, and it would be no defence that the defender was in the mistaken belief that the former marriage had been legally dissolved by divorce (see *Whitworth* [1893], P. 85; and cf. *Purres' Trs.*, 1895, 22 R. 513). 6. It would also be a good defence for a wife, that she had not consented to the act of connection founded on (see *ADULTERY*). 7. That the marriage sought to be dissolved was null *ab initio* (*A. B. v. C. B.*, 1884, 11 R. 1060, 12 R. (H. L.) 36).

*Evidence of Adultery*.—There must be enough "to lead the guarded discretion of a reasonable and just man to the conclusion that adultery has been committed" (per Ld. Stowell in *Loveden*, 1810, 2 Hag. Con. 2; see *Cadogan*, 1796, *ib.* 4; *Allen* [1894], P. at p. 251; *Walker*, 1871, 9 M. 1091). No general rule can be formulated as to what degree of specification of the time and place of adultery will be required. So much depends on the circumstances, and on the reasons why more precision is impossible (see

*Walker, ut supra*; *Steel*, 1835, 13 S. 1096; *Tulloch*, 1861, 23 D., per L. J. C. Inglis at p. 644; *Secder*, 1897, 34 S. L. R. 245). The uncorroborated evidence of one witness is not sufficient, and the testimony of a boy of six in corroboration was rejected (*Robertson*, 1888, 15 R. 1001). But a witness to one act may be corroborated by a witness to another act (*Whyte*, 1884, 11 R. 710; *Dickson on Evid.* 1808; see *Dombrowski*, 1895, 22 R. 906). The evidence of prostitutes that the defender committed adultery with them may be sufficient, though it will be received with caution (*Tennant*, 1883, 10 R. 1187).

Antenuptial incontinence by the defender may be proved, if with the person with whom the adultery is alleged (*Perrin*, 1822, 1 Add. 3; *Reeves*, 1813, 2 Phillim. at p. 127; *Fraser, H. & W.* ii. 1164). Proof of indecent conduct by a man to a servant in his house was in one case admitted to corroborate the evidence of another servant that he had committed adultery with her (*Whyte, ut supra*). The fact that the defender went to a brothel is strong presumptive evidence of adultery, but may be rebutted (*Astley*, 1828, 1 Hag. Ec. 719; *Kenrich*, 1832, 4 Hag. Ec. at p. 138; *Marshall*, 1881, 8 R. 702; *Ciocci*, 1853, 1 Spinks, 121; *Edward*, 1879, 6 R. 1255). Proof that the defender infected the pursuer with venereal disease is *prima facie* evidence of adultery (*Popkin*, 1794, 1 Hag. Ec. 767; *Collett*, 1838, 1 Curt. at p. 688; *King*, 5 *Notes of Cases*, 252; *Fraser, H. & W.* ii. 1159. See *Morphett*, 1869, L. R. 1 P. & D. 702).

A confession by guilt made by the defender *ante litem motam* is entitled to great weight, if there is nothing to lead the Court to suspect collusion (*Fallerton*, 1873, 11 M. 720; *Duncan*, 1893, 30 S. L. R. 435 (O. H.); *Robinson*, 1859, 1 S. & T. 362; *Le Marchant*, 1876, 45 L. J. P. & M. 43; *Williams*, 1865, L. R. 1 P. & D. 29). Such a confession is not evidence against the co-defender unless it has been communicated to him and not denied (*Crawford*, 1886, 11 P. D. 150; *Laidlaw*, 1894, 2 S. L. T. No. 187).

Judicial admissions by the defender, though received with caution, may go far to establish the charge. By 11 Geo. iv. and 1 Will iv. c. 69, s. 36, they must be corroborated (see *Muirhead*, 1846, 8 D. 786; *Macfarlane*, 1847, 9 D. 500; *Dickson, Evid.* s. 284; and see CONSISTORIAL ACTIONS). Confessions made by the *particeps criminis* outwith the presence of the defender are not admissible unless they have been communicated and not denied (*Burgess*, 1817, 2 Hag. Con. 223; *Croft*, 1830, 3 Hag. Ec. at p. 318; *A. v. B.*, 1858, 20 D. 407).

2. *DESERTION*.—Divorce for *DESERTION* (*q.v.*) was introduced by the Act 1573, c. 55. It is necessary to prove that there has been malicious and obstinate non-adherence for four years (see *ADHERENCE*; and *A. v. B.*, 1896, 23 R. 588). It must appear that the pursuer did not acquiesce in the separation, but was desirous to resume cohabitation. In the general case, it must be shown that the pursuer requested the defender to adhere (*Watson*, 1890, 17 R. 736; *Gibson*, 1894, 21 R. 470; *Mackenzie*, 1895, 22 R. (H. L.), per Herschell, L. C., at 34; *O'Hara*, 1893, 1 S. L. T. No. 538; *Taylor*, 1896, 4 S. L. T. No. 241). Where, however, from ignorance of the deserter's address, or other reasons, it is clear that any such request would have been impossible or fruitless, it may be dispensed with (*Watson, ut supra*; *Murray*, 1894, 21 R. 723). Where the defender has offered to adhere, the Court will scrutinise the circumstances and the manner in which the offer was made, in order to judge of its *bona fides*, and will disregard it if it appears to have been insincere, and made merely in order to prevent the success of the action (*Muir*, 1879, 6 R. 1353; *Fraser, H. & W.* ii. 1214; see *Mackenzie*, 1892, 20 R. 636; 1895, 22 R. (H. L.) 32). It is not settled if a *bona fide* offer

comes too late after the action is raised, but it is thought that this would not be held (*Auld*, 1884, 12 R. 36). It is not desertion if the one spouse is compelled to leave the home in order to prosecute his or her business, or if the absence is caused by imprisonment (*Young*, 1884, 10 R. 184; *Williams*, 1864, 3 S. & T. 547; *Fraser*, *ib.* 1213). It is not a bar to the action that the pursuer was the first to leave the common home, as, *e.g.*, where the wife is compelled to leave on account of the husband's violence and drunkenness. Such cases turn on their particular circumstances; but where the husband conceals his address, or disregards an offer by the wife to resume cohabitation, the fact that the wife was actually the first to leave the home will not prevent her obtaining decree (*Gow*, 1887, 14 R. 443; *Murray*, *ut supra*; *Munro*, 1895, 2 S. L. T. No. 581). And a separation which is not at first desertion may become so by a change of *animus*. *E.g.*, a wife who has been living apart voluntarily may desire to return, and intimate her willingness to do so. If the husband then refuses to take her back, having no valid reason for non-adherence (see ADHERENCE), he will be in desertion. Or a husband who has left his wife, to seek employment, at first intending to come back, may change his mind, and afterwards show a clear intention to break off all communication with his wife. In such cases desertion will date, not from the separation, but from the time at which the defender's intention to refuse adherence first became manifest (*Gow*, *Munro*, *ut supra*; *Gibson*, *ut supra*, per Ld. Rutherford Clark at 479; *Fraser*, *H. & W.* ii. 1210; see *Gatehouse*, 1867, L. R. 1 P. & D. 331; *Stickland*, 1876, 35 L. T. 767; *Farmer*, 1884, 9 P. D. 245; *Garcie*, 1888, 13 P. D. 216). For other defences, see ADHERENCE, and *supra*, Nos. 1 and 7 of *Defences to Divorce for Adultery*. Long delay would in this case hardly be sustained as in itself importing acquiescence and barring the action (*Mackenzie*, 1883, 11 R. 105).

*JURISDICTION FOR DIVORCE*.—There has been much divergence of judicial opinion as to whether residence for a considerable period within the territory might not be sufficient to give the Court jurisdiction to grant divorce, although the husband might not have a Scottish domicile for succession. And where Scotland was the matrimonial home, divorce has been granted, though the evidence pointed to the husband being domiciled in another country (*Jack*, 1862, 24 D. 467; *Pitt*, 1862, 1 M. 106; rev. 1864, 2 M. (H. L.) 28; *Watts*, 1885, 12 R. 894; *Hall*, 1895, 32 S. L. R. 468; see *Stavert*, 1882, 9 R. 519; *Low*, 1891, 19 R. 115; *Dombrowski*, 1895, 22 R. 906; *Hanna*, 1895, 3 S. L. T. No. 252; *Walton*, *H. & W.* 426 *seq.*). But it is thought, if the question came up in the Inner House, that the Court would now follow the elaborate opinion of Ld. Watson in delivering the judgment of the Privy Council in *Le Mesurier* [1895], App. Ca. 517. In that case, after full examination of the previous authorities, both Scottish and English, which supported the theory of matrimonial domicile as distinct from domicile for succession, it was held that the permanent domicile of the spouses within the territory was necessary to give its Courts jurisdiction so to divorce *a vinculo*, as that its decree to that effect should, by the general law of nations, possess extra-territorial authority (see Dicey, *Conflict of Laws*, p. 269 *seq.*). If the husband is permanently domiciled in Scotland, it is immaterial that his motive in settling there was to obtain a divorce (*Stavert*, *ut supra*; *Carswell*, 1881, 8 R. 901; see *Steel*, 1888, 15 R. at p. 904). The *locus delicti* is also immaterial (*Warrender*, 1835, 2 S. & M.L. 154; *Carswell*, *Steel*, *ut supra*). And where the husband, being domiciled in Scotland, deserts his wife or commits adultery, and thereafter acquires a foreign domicile, the wife is



still entitled to her remedy in Scotland (*Hume*, 1862, 24 D. 1342; *A. B.*, 1845, 7 D. 556; *Redding*, 1888, 15 R. 1102; *Fraser*, II. & W. ii. 1212, 1289; and see English authorities in *Walton*, II. & W. 434; but see *Dicey*, *ut supra*, p. 375). But the husband must have had a Scotch domicile (*A. B.*, *ut supra*; *Hanna*, 1895, 3 S. L. T. No. 252). See DOMICILE.

**RECOGNITION OF FOREIGN DIVORCE.**—If a Scotsman acquires a foreign domicile, and obtains a divorce, or is divorced in the foreign country, the divorce will be recognised as valid, if granted for a cause sufficient to justify dissolution of the marriage by our law. And it is thought that even if granted for a ground not admitted in Scotland, the divorce should, on the principle of reciprocity, be treated as valid if it was for a serious matrimonial offence, as, *e.g.*, cruelty (*Carswell*, *ut supra*; *Harvey*, 1882, 8 App. Ca. 43; *Humphrey*, 1895, 33 S. L. R. 99; see *Le Mesurier*, *ut supra*; *Walton*, II. & W. 442 *seq.*; *Eversley*, *Law of Domestic Relations*, 2nd ed., p. 470; but see *Fraser*, II. & W. ii. 1331). Whether it would be recognised if granted for incompatibility of temper, or some like ground, is more doubtful (see *Jack*, *ut supra*, at p. 472; *Pitt*, 4 Macq. at p. 640; *Harvey*, 1880, 6 P. D. at pp. 47 and 79; and see the authorities referred to, as to the effect of change of domicile, under ADMINISTRATION, HUSBAND'S RIGHT OF, vol. i. at p. 122). But a foreign divorce will not be recognised if it is shown that it was procured by fraud or collusion (*Bonaparte* [1892], P. 402; *Shaw*, 1868, L. R. 3 Eng. & Ir. App. 55).

**EFFECTS OF DIVORCE.**—(a) *Effects upon the Person and Capacity of the Spouses.*—Divorce, as already stated, severs the bond of marriage. The marriage comes to an end at the date of the decree by the Lord Ordinary, unless his judgment should be reversed by the Inner House or by the House of Lords (see *Robertson*, 1888, 16 R. 1001). After the expiration of the reclaiming days, either spouse of the dissolved marriage is free to marry again (*Ersk.* i. 6. 43; *Fraser*, II. & W. ii. 1216). And even after decree by the Lord Ordinary, and before the reclaiming days have expired, there seems to be no impediment to a second marriage, although this will be a nullity if the decree granting divorce is recalled on appeal. In England, a second marriage is not lawful as long as appeal is possible or, when an appeal is taken, until it has been disposed of (20 & 21 Vict. c. 85, s. 57). The second marriage of a divorced person, at whatever time contracted, will be rendered invalid if the decree of divorce should afterwards be reduced upon any sufficient ground, as, *e.g.*, that it was procured by fraud, or if it should be shown that the Court which granted the divorce had no jurisdiction over the parties (*Beggs*, 1889, 16 R. 550; *Bonaparte* [1892], P. 402, and *h.t. infra*, *Reduction of Divore*). And by the Act 1600, c. 20, a marriage is null if contracted by a spouse divorced for adultery with the paramour named in the decree. See ADULTERY; MARRIAGE. The usual prayer of a summons of divorce is that the pursuer should be found entitled to marry any free man (or woman, as the case may be), *as if she had never been married to the defender*, or as if he were naturally dead. But, probably, the words “or as if he were naturally dead” would be read as exegetical of, or as limiting, those preceding; for it is hard to see upon what principle it could be held that divorce severs the tie of affinity between either spouse and the relations of the other, so as to make any marriage lawful which would not have been so if the first marriage had been dissolved by death and not by divorce.

By the Act 1592, c. 119 (Thomson's ed., c. 11), a woman divorced for adultery who completes unlawful and pretended marriage with the paramour (whether named in the decree or not), or plainly and openly dwells with

him at bed and board, is disabled from disposing her heritage onerously or gratuitously to any person in prejudice of her lawful heirs whatsoever (*Irvine*, 1707, M. 6350 and 9471; Ersk. ii. 3. 16; Fraser, *H. & W.* ii. 1224; see ADULTERY). After divorce, the former wife retains the husband's domicile, but is free to change it (see *Le Sueur*, 1876, 1 P. D. 139).

(b) *Effects upon Property*.—The guiding rule is that on divorce the innocent spouse comes into immediate enjoyment of all rights, legal or conventional, in the estate of the offender, or the funds settled by the marriage contract, as if the guilty spouse had died at the date of the decree. In other words, for the purpose of ascertaining the patrimonial rights of the spouses *inter se*, the divorce is to be equivalent to the natural death of the offending party (Stair, i. 4. 20; Ersk. i. 6. 48; Fraser, *H. & W.* ii. 1216; Walton, *H. & W.* 196; see also an article on this subject in *Juridical Review*, vol. vi. p. 35). This rule, however, does not apply to the husband's statutory *jus relictæ* (see *infra*). The *punctum temporis* looked at is the date of the decree. The innocent spouse has no interest in rights which do not emerge to the guilty till after divorce (*Elgin*, 1827, 5 S. 243). On the other hand, the guilty spouse is not barred by the divorce from claiming a fund which had vested in him before its date, but had not been paid (*Ferguson*, 1877, 4 R. 393). In the case of divorce for desertion, the Act 1573, c. 55, provides "the said partie offender to tyne and lois thair tocher, *et donationes propter nuptias*." These words have in practice always been held to cover all provisions, legal and conventional (Stair, *loc. cit.*; Ersk. *loc. cit.*; see *Harvey*, 1870, 8 M. 971; 1872, 10 M. (H. L.) 26). In the case of divorce for adultery, the same rule seems to have been followed even when, before the Reformation, divorce was only granted *a mensa et thoro* (see *Harvey, ut supra*).

It was held in one case, that a husband divorced for adultery was not bound to restore a tocher which had been paid in cash and immixed with his funds (*Justice*, 1761, M. 334; see *Ferguson*, 1877, 4 R. 393). The grounds of this decision, which is not disapproved of in the case of *Harvey*, would apply equally in the case of divorce for desertion (see Ersk. i. 6. 47; Fraser, *H. & W.* ii. 1222). If the words "tyne and lois thair tocher" should be held to mean that the husband, divorced for desertion, must restore a tocher paid in cash, a husband divorced for adultery is, according to the case of *Justice*, in a better position. With this possible exception, it is now settled that the effects of divorce are the same whether the ground be adultery or desertion (Fraser, *H. & W.* ii. 1216; *Harvey, ut supra*; see opinion of Ld. Kyllachy, Ordinary, in *Harvey's Jud. Factor*, 1893, 20 R. 1016).

1. *LEGAL RIGHTS*.—In accordance with the doctrine stated above, the innocent wife who obtains a divorce, if her legal rights have not been excluded by contract, becomes at once entitled to one-third of the rents of her husband's heritage in name of TERCE (*q.v.*), and to one-half or one-third of the capital of his moveable estate in name of JUS RELICTÆ (*q.v.*) (*Johnstone-Beattie*, 1867, 5 M. 340; *McElmail*, 1888, 16 R. 47). Similarly, the innocent husband becomes entitled to the liferent of his wife's heritage in name of COURTESY (*q.v.*), if the conditions are present upon which that right depends (*Inncrwick*, 1589, M. 329). But upon a narrow construction of the Married Women's Property Act, 1881 (*q.v.*), it has recently been held that a husband who has divorced his wife is not entitled to claim the right, conveniently called *jus relictæ* which that Act created (*Eddington*, 1895, 22 R. 430).

Conversely, the guilty spouse loses all claim to legal rights on the death of the innocent spouse (Stair, Ersk., Fraser, *ll.c.*; *Ritchie*, 1874, 1 R. 987).

2. *CONVENTIONAL PROVISIONS.*—The innocent wife (or husband) is entitled to claim at once all marriage-contract provisions made in her favour by the guilty husband or anyone on his behalf.

So an annuity provided by the husband's father, in an antenuptial contract, to his son, whom failing, to his son's wife, becomes payable at once to the wife if she divorce the husband (*Johnstone-Beattie, ut supra*). And where the annual proceeds of funds, proceeding partly from the husband's and partly from the wife's side, were to be paid to the husband during the joint lives, and to the survivor on the dissolution of the marriage by death, it was held, on the husband being divorced, that the whole annual proceeds must be paid to the wife during her life (*Harvey, 1872, 10 M. (H. L.) 26*). But as regards contingent interests which may emerge if the guilty spouse survives the innocent, a distinction is drawn. The guilty spouse loses for ever all interest in funds paid, or undertaken to be paid, by the innocent spouse or his or her relations (*Johnstone-Beattie, 1868, 6 M. 333*). But the contingent interest of the guilty spouse in funds proceeding from his side is not extinguished by the divorce, and he will enter upon or resume the enjoyment of these if the innocent spouse, who has been taking the annual proceeds, should be the predeceaser (*Harvey's Jud. Factor, 1893, 20 R. 1016*). It is only in a question between the spouses that divorce will be held as equivalent to the natural death of the offender in construing a marriage contract. In a question with children, such words as "survivor," "dissolution of the marriage by death," and the like, will be read in their ordinary sense, and rights which, under the contract, are to vest in children at the death of the husband, will not vest on his being divorced (*ib.*; and see *Smith's Trs., 1897, 4 S. L. T. No. 309*).

Testamentary bequests to the innocent spouse, not made *intuitu matrimonii*, payable on the dissolution of the marriage by death, will not become payable on his or her obtaining a divorce, unless this intention is clearly indicated by the terms of the bequest (*Mason, 1878, 6 R. 37; Taylor's Trs., 1893, 20 R. 1032; Humphrey, 1895, 33 S. L. R. 99*). And rights flowing from third parties *stante matrimonio*, and not granted *intuitu matrimonii*, e.g. a tack granted to a man and his wife, and the longest liver of them two, will not be affected by the divorce (*Argyll, 1573, M. 327 and 6184*). Donations made by the innocent spouse to the guilty are revoked *ipso facto* by the divorce, while those made by the guilty spouse become irrevocable at the date of decree, and even, according to one case, after commission of the offence for which decree is granted (*Murray, 1576, M. 328, 2nd report; Ersk. 1. 6. 31; Fraser, II. & W. ii. 1224*). See DONATIONS INTER VIRUM ET UXOREM.

*REDUCTION OF DIVORCE.*—A decree of divorce may be reduced on the ground that the witnesses were suborned to give false evidence, or that the divorce was procured by fraud or COLLUSION (*q.v.*) (*Begg, 1889, 16 R. 550*; see *Bonaparte [1892], P. 402*). In an American case in which a husband had induced his wife, by false and fraudulent statements, not to defend the action, the decree was afterwards set aside (*Colby, 1894, 50 Amer. Rep. 426*). It would seem that mere averments that the decree was procured by perjury, without any allegation of bribery, would not be relevant (see *Lockyer, 1876, 3 R. 882, 4 R. (H. L.) 32; Begg, ut supra; Fraser, II. & W. ii. 1236*). It is not settled whether reduction of a decree in absence is competent after year and day. In the narrative to *Harvey, 1872, in 2 Paterson's App. 1992*, it is said that an action for reduction of a decree of divorce obtained in absence, had been dismissed on the ground

that a year and day had elapsed since the date of the decree (see *Lockyer, ut supra*; Fraser, *loc. cit.*; Mackay, *Manual*, 625).

[See Stair, 1. 4. 7; 1. 4. 20; Bankt. 1. 138. 126 *seq.*; Ersk. 1. 6. 43 *seq.*; Bell, *Prin.* 1530 *seq.*; Fraser, *H. & W.* ii. 1128–1176, and 1207–1226; Mackay, *Manual*, 475 *seq.*; Walton, *H. & W.* 33 *seq.*, 196 *seq.*, 426 *seq.*]

See ADHERENCE; ADULTERY; Co-DEFENDER; CONSISTORIAL ACTIONS; DESERTION; DOMICILE; EXPENSES; MARRIAGE.

**Dock Warrants** are documents ordering or authorising the removal of goods or merchandise from a dock warehouse. They are “documents of title” under the Factors Acts, 1889 and 1890 (52 & 53 Vict. c. 45, s. 1 (4); 53 & 54 Vict. c. 40); and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 62 (1)). See WAREHOUSING.

**Docquet.**—See ACCOUNTS; DEEDS, EXECUTION OF; SASINE; NOTARIAL INSTRUMENT.

**Document of Title.**—*Definition.*—This phrase is defined in the Factors Act, 1889 (52 & 53 Vict. c. 45, s. 1), as follows: “The expression document of title shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.” This definition is adopted in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 62), and is taken, with slight alterations, from the Factors Act, 1842 (5 & 6 Vict. c. 39, s. 4).

*Instruments included under this head.*—For the law relating to the transfer of documents of title, reference is made to BILL OF LADING, DELIVERY-ORDER, and FACTORS ACT; all that it is proposed to consider here is the question to what documents the above-quoted definition is applicable. There would seem no doubt that a negative test is that the document in question must be used *in re mercatoria*. Thus if a party should issue a document purporting an obligation to deliver to a person named, or to the bearer, the furniture in his house, or the stock-in-trade in his shop, the privileges of a document of title would not attach to it (Blackburn on *Sale*, p. 418). And, in a case of somewhat special circumstances, where an undertaking to deliver to a party named 200 tons of railway chairs was originally granted solely for the purpose of raising money, and was transferred by endorsement in blank, it was held that this document was not granted *in re mercatoria*, and that, consequently, mere endorsement was not an adequate method of transferring the obligation therein contained, and an endorsee had no title to sue the grantor (*Commercial Bank*, 1859, 21 D. 864). And a qualified or conditional delivery-order is not a document of title. Thus where A. gave to B., in security of an advance, a sale note acknowledging that B. had bought certain copper rollers lying in A.’s warehouse, and the warehouse-keeper intimated that he held the rollers at the disposal of B., subject to the condition that A. should have the right to remove any of them he might require for the purposes of his business, it was held that these documents gave B. no right to the rollers in a question with the trustee in the bankruptcy of A. (*Mackinnon*, 1868, 6 M. 974;

see also *Fermiloe*, 1876, 1 C. P. D. 445). Proof of a general trade understanding to treat a particular form of document as a document of title would go far to induce the Courts to regard it as such; but a custom of trade may be founded on an error in law (*Gunn*, 1875, L. R. 10 Ch. 491), and a local custom, or the usage of a particular market, will not be enforced against a party who had no knowledge or notice of it. Thus it was held that an alleged custom of the Port of Bombay to treat mate's receipts—i.e. receipts given by the mate on goods being taken on board—as documents of title which gave the holder the right to have the bill of lading made out to his order, could not be binding on a ship's captain who had no notice of the custom, and was alleged to have signed bills of lading in favour of a party who was not in possession of the mate's receipts (*Hathesing*, 1873, L. R. 17 Eq. 92).

It has been laid down in an English case that, in order to give a document the privileges of a document of title, it must be framed in terms which purport either an obligation on the part of the granter, or an order on some other party, to deliver goods. A mere statement that goods are, as a matter of fact, lying in a particular place, is not a document of title, even although there is a usage in a particular trade to treat it as such. Thus a wharfinger's certificate, containing the statement that certain specified goods were lying at a particular wharf, but without any express obligation to deliver them to the grantee, was held not to be a document of title (*Gunn*, 1875, L. R. 10 Ch. 491, per Mellish, C. J., at p. 502).

See BILL OF LADING; DELIVERY-ORDER; FACTORS ACT; PLEDGE.

**Dog Licence.**—Subject to certain exemptions, every person who keeps a dog must annually take out a licence, the price whereof is seven and sixpence. It is the person, not, as is sometimes supposed, the dog, which is licensed; and accordingly a new licence is not required on a change of dogs, whilst, on the other hand, a person who, not having a licence, acquires a dog, must take out a licence, although the person from whom the dog was acquired had a licence for the current year.

The provisions with reference to dog licences are contained in the Dog Licence Act, 1867 (30 & 31 Vict. c. 5), as amended by the Customs and Inland Revenue Act, 1878 (41 Vict. c. 15). All licences expire upon 31 December in each year (1867 Act, s. 5), no matter at what period of the year they may have been taken out.

The exemptions under the Act are as follows:—

(1) *Blind Persons' Dogs.*—The Customs Act, 1878, provides (s. 21) that nothing in the Dog Licence Act, 1867, or in this Act, shall render a licence necessary in the case of a dog kept and used solely by a blind person for his guidance.

(2) *Shepherds' Dogs.*—The Act 32 & 33 Vict. c. 14, s. 39, in regard to shepherds' dogs, is repealed by the Customs Act, 1878, s. 18, and it is provided that farmers and shepherds keeping sheep dogs must obtain an exemption from the officers of the revenue. The exemption applies only to dogs kept solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd. Two dogs may be so kept, or more, up to eight, in proportion to the number of sheep on common or unenclosed land. The possession of an exemption certificate is at least *prima facie* evidence that the dog is within the category entitled to exemption (*James*, 50 J. P. 292). The fact that a person is reasonably entitled to an exemption

certificate is no defence to a prosecution, for the Commissioners of Inland Revenue, and not the justices, are the persons to decide whether a person is entitled to exemption, and if the accused cannot produce an exemption certificate he must be convicted (*Graham*, 58 J. P. 835). The fact that, in the opinion of the justices, an exemption ought to have been granted does not warrant them in treating the offence as only a nominal one (*Phillips*, 60 J. P. 120).

(3) *Young Dogs*.—No licence is required for any dog under the age of six months (Dog Licence Act, 1867, s. 10); and where an owner or a master of hounds has taken out proper licences for all the hounds entered in any pack kept by him, it is not necessary for him to take out a licence in respect of any hound under the age of twelve months which has never been entered in or used with any pack of hounds (Customs Act, 1878, s. 20). The onus of proof of the age of a dog lies on the owner (*ib.* s. 19).

Dog licences are subject to the Excise Acts (1867 Act, s. 4). The person in whose custody the dog is found is presumed to be the owner, unless the contrary be proved, and the penalty for contravention is five pounds for each offence (s. 8). A like penalty is imposed for failure, on the part of the person who has taken out a licence, to produce it on demand (s. 9). The penalties may be recovered either under the Excise Acts (s. 4), or upon information of a police constable before a Court of summary jurisdiction. Such Court has power to mitigate penalties and to award expenses (Customs Act, 1878, s. 23). Where an excise officer prosecutes under the Excise Acts, the Court may mitigate to any sum on a first offence, but to not less than one-fourth for any subsequent offence, whether it is charged as a second offence in the information or not (*Murray*, 22 Q. B. D. 142).—[On this subject see Warry on the *Game Laws*, 190-199.]

**Dogs.**—See ANIMALS, LIABILITY FOR DAMAGE CAUSED BY DANGEROUS; CRUELTY TO ANIMALS.

**Dole.**—*Dolus malus*, as opposed to *dolus bonus*, may in its most general sense be described as wrongful intention. In practice it has to be considered in connection with Contract, Quasi-Delict, and Criminal Delict. In the first it is defined as a machination or contrivance to deceive (Ersk. iii. 1. 16; Stair, i. 9. 9), and is synonymous with FRAUD (which see). It gives rise to an action of reduction at the instance of the party deceived, or may be advanced by him when sued by the fraudulent party, as a plea in bar (Ersk. *supra*). In quasi-delict it is usually described as malice, and, though the element of deceit or misrepresentation may be present in some cases, as in Seduction, it is more usually exemplified in Slander, Abuse of Diligence, and the like. It belongs to the domain of intentional wrongs, or Acts of Commission as opposed to Negligence, or Acts of Omission, and it is in the former sense that the maxim *culpa lata quæ dolo æquiparatur* is to be understood (Stair, i. 9. 11). In that case, the presence of dole, besides founding an action at the instance of the injured party, is held to exclude relief *inter se* if there have been several co-delinquents (*Palmer*, 1894, 21 R. (H. L.) 39, 46).

**Dolus malus.**—The expression is defined by Labeo, and the definition is approved by Ulpian, as follows: *Dolus malus est omnis*

*calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum, alterum adhibita* (D. 4. 3. 3. 2). *Dolus*, as used in Roman law, has two distinct shades of meaning. In the first sense, the term, usually qualified by the adjective *malus*, and often with the addition of *sciens*,—*sciens dolo malo*,—is used to express wrongful intention, i.e., as opposed to *casus, error, ignorantia*, etc. Thus, in the law of reparation, it is practically equivalent to the word "malice." So, when applied to contract, it means a deliberate breach of duty, expressly or impliedly laid on one of the contracting parties. *Dolus*, in this sense, always entailed liability, which could not be evaded even by an explicit agreement to the contrary (D. 50. 17. 23). No act amounted in law to a delict unless *dolus* of this kind were present, except in the single case of *damnum* or damage to property. In this case, if any culpa were established, liability accrued—"in lege Aquilia etiam levissima culpa venit" (D. 9. 2. 44, pr.). In the second sense, the term is used, as opposed to *bona fides*, to denote trickery or fraud in the dealings of one man with another. In the Roman law of contract there was in all cases an implied warranty against *dolus*. In contracts *bonæ fidei* a formal plea of *dolus* had always been unnecessary—*doli exceptio inest bonæ fidei iudiciis* (D. 24. 3. 21). In actions *stricti iuris* it was made pleadable in the form of an *EXCEPTIO (q.v.)—exceptio doli*—by Aquilius Gallus, Cicero's colleague in the praetorship. By him, also, the direct action, *actio doli*, seems to have been introduced. Since, however, the *actio doli* entailed *infamia* on the party condemned, it was granted only when no other remedy was available. Further, after the lapse of two years in the Justinian law—*post annum utilem* in the praetorian law—it could be brought only in the shape of an *actio in factum*, and could give rise to a claim for compensation only to the extent to which the defender was *lucratus* by his *dolus* (Vangerow, s. 605; see the title, *De dolo*, D. iv. 3).

The older civilians distinguish *dolus causam dans*, fraud giving rise to the contract, without which it would not have been made, and *dolus incidens*, fraud accompanying the contract, but not its inductive cause: the former was held to avoid the contract absolutely, the latter merely to ground a claim for damages (Pothier, *Oblig.* s. 31; Bell, *Com.* i. 362). The modern view is that fraud did not *ipso jure* annul a *bonæ fidei* contract, there being an actual assent of the will, though induced by fraudulent means. It entitled the person defrauded to a remedy, the effects of which varied with the circumstances. If the fraud is merely incidental, an award of damages can be got (e.g. D. 4. 3. 9; D. 19. 1. 4, pr.); if it induced the contract, the contract can be rescinded at the instance of the injured party (C. 4. 44. 5. 8; D. 19. 2. 23).

The expression *dolus bonus* is used to denote the artifice which may justifiably be employed in dealing with an enemy or a robber (D. 4. 3. 1. 4). In other words, *dolus bonus* is not recognised by Roman law within the sphere of normal civil relations: it becomes legitimate only when one passes beyond the region of ordinary civil and social relations. In some Scotch text-books it is stated that *dolus bonus* was recognised by the Romans, as part of their ordinary commercial law, in the sense of "permissible dexterity in driving a bargain." While it is true that statements by a seller made merely by way of puffing, as to the truth of which the purchaser could easily inform himself, did not base an *exceptio doli mali*, this was simply on the ground that such *commendatio* or "dealer's talk" really meant nothing. "What a seller says by way of praising his goods must be considered as if it were not said at all" (J. 4. 4. 37). See DOLE; FRAUD.

**Domicile** is defined by the latest writer on the subject as the place or country which either in fact is, or by a rule of law is determined to be, the permanent home of an individual (Dicey, *Conflict of Laws*, Rule 1). Domicile denotes a relationship which a person bears to the municipal law of the State of whose legal community he is a member. It indicates and defines his personal law, that is, the law by which his succession, status, and personal rights and privileges are to be regulated. Many of the problems of jurisprudence depend on the personal law; that is to say, they are to be solved by a law chosen with reference to the persons, and not to the other circumstances, involved in them. In our law, and in Anglo-American jurisprudence, this choice is regulated by the domicile of the individual concerned. In Continental systems, on the other hand, the modern tendency is to substitute NATIONALITY (*q.v.*) for domicile. For the purposes of the choice Nationality has the great advantage of being both easily ascertained and capable of precise definition and regulation by the positive law of each State. But as these laws may overlap, a person runs the risk of being regarded as a subject of more than one State at the same time, and his personal law may remain in doubt on account of his double nationality. Moreover, in a country in which more than one system of municipal law is in operation, as in the United Kingdom, the nationality of the person is an insufficient criterion of his personal rights and privileges. For these depend upon the particular territorial system under which he lives, and must therefore be defined more precisely than can be done by an inquiry into his nationality alone. On the other hand, the connection of the person with the locality, which is expressed in domicile, is at once the natural basis of his personal rights and affords an adequate criterion of them. Hence even these jurists who pronounce in favour of Nationality, admit recourse to domicile as an auxiliary principle. (See Bar, s. 92*a*, Gillespie's trans., p. 205.)

The term domicile is derived from the Roman law, but the word has a more extensive signification than the Latin *domicilium*, and must be carefully distinguished from it. The latter denoted only that connection between an individual and the urban community of which he was a member, which resulted from his establishing a permanent residence within its territory. That connection subjected him to the municipal burdens of the community, the jurisdiction of its Courts, and, as a quality of his person, to its laws. A similar connection was also constituted by *origo*, which resulted from birth within the territory, or was acquired by adoption, manumission, or election as a member of the community. The same rights and liabilities were created in each case; but while those of *domicilium* could be both acquired and lost by the will of the party, the tie of *origo* was created independently of his intention or act, and was never completely dissolved. The terms *domicilium* and *origo* are thus mutually exclusive of one another, and the modern phrase "domicile of origin" would have been unintelligible to a Roman lawyer. Its use indicates that domicile in modern law embraces the characteristics of both. But the necessity for such combination could scarcely occur in the Roman jurisprudence; for while a person might refrain from establishing a *domicilium*, it was only in the most exceptional cases that he had not *origo* in some urban community, and the case of his being without a personal law depending upon one tie or the other could hardly occur. (Sav. viii. s. 351.) Again, in the Roman law, both *domicilium* and *origo* were of importance, chiefly as sources of jurisdiction. As the law of the empire was uniform, and conflicting territorial laws were unknown, a criterion for the choice of laws was of less



importance than a criterion of the grounds upon which a person could be subjected to the jurisdiction of a local Court. For that purpose, *origo* soon ceased to be much used, and the *forum originis* is but little mentioned in the *corpus juris*. Its application, says Savigny (viii. 355), to one who had *origo* and *domicilium* in two different municipalities, was always limited to the case in which he happened to be found in the town to which he belonged by *origo*,—and, in any event, he would be more easily and conveniently reached in the place of his actual residence. There is nothing, therefore, in the Roman notion of *domicilium* to prevent a man being, in respect of it, a member of more than one urban community, and thus subject at the same time to more than one local law. But the use of domicile in modern law, as the criterion of the personal law of the individual, implies in strictness the unity of the test, and is incompatible with the co-existence of more than one domicile properly so called. "It is clear that by our law a man must have some domicile, and must have a single domicile" (per Ld. Ch. Hatherley in *Udy*, 1869, 7 M. H. L. 69). This has been doubted, and it has been suggested by more than one authority that a man might have a domicile in one country for the determination of one class of rights, and a domicile in another for the determination of another. "The facts and circumstances," writes Phillimore (iv. s. 54), "which might be deemed sufficient to establish a commercial domicile in time of war, and a matrimonial or forensic or political domicile in time of peace, might be such as according to English law would fail to establish a testamentary or principal domicile." But the notion of the plurality of domicile, in the proper sense of that term, is opposed to the principles by which the law of domicile in modern times is governed, and is not, as Dicey (*Conflict of Laws*, p. 96) points out, supported by any decided case. It proceeds truly upon a lax use of the term. Thus, commercial or trade domicile in time of war expresses "a principle of public international law by which the belligerent or neutral character of property is determined for the purposes of maritime war" (Westlake, p. 322): while, on the other hand, the object of the law (*i.e.* international private law) in searching for and ascertaining a man's domicile has been stated to be "to ascertain the particular municipal law by which his private rights are regulated and defined" (*Craigish*, 1872, 3 Ch. 180, per Chitty, J.). The two legal conceptions have thus in their nature nothing in common. Again, forensic domicile, so called, implies only that a person is subject to the Courts of a particular country—a liability which may obviously arise upon a residence far short in nature and duration of that which would suffice to subject him to a complete change of his personal law, *e.g.* in the matter of his succession (see *Domicile of Citation*, *infra*). Similarly, the expression "matrimonial domicile" simply means the home of the married persons. And it is plain that spouses may, by residence in a country, subject themselves to the jurisdiction of its courts in respect of their conjugal relations, and to many effects, without thereby giving these courts a right to alter their status as married persons by a decree of divorce (*Le Mesurier* [1895], A. C. 517). In the judgment of the Privy Council delivered by Ld. Watson in this case, the authorities, both in England and Scotland, on the subject of matrimonial domicile are examined in detail. (See *Matrimonial Domicile*, *infra*.) The only case in which the possibility of a man's having more than one domicile in the true and proper sense, is admitted by our law, is that which may arise under the operation of the Domicile Act, 1861 (24 & 25 Vict. c. 121). By that Statute the Crown is empowered to enter into a convention with a foreign State,

to the effect that no British resident in that State, and no subject of that country resident in Britain, shall be deemed to have acquired, for the purpose of succession to moveables, a domicile in the country in which he dies, unless he has made a written declaration of intention to become domiciled there, and has otherwise complied with the requirements of the Act. No such convention has yet been concluded, and the Act therefore remains a dead letter. But if one were made with a country in which a British subject, who had not complied with the requirements of the Act, was actually domiciled at the date of his death, his succession in moveables would apparently remain unaffected, although the foreign domicile would regulate his personal law in other respects, as *e.g.*, the legitimacy of his children born in the foreign country after the domicile had been acquired.

The leading characteristics of domicile in modern law may be summed up thus:—(1) It expresses the relation of an individual to a State which arises from residence within its limits as a member of its community. (2) A person's domicile is the place or country which is considered by law to be his home. (3) Every person must have a domicile, and no person can at any time be without one. (4) No person can have at the same time more than one domicile in the proper sense of the term, *i.e.*, for the purpose of defining and regulating his personal law. These principles, which are common to English and Scots law, are laid down and illustrated by the leading decisions on the subject in both countries. [*Bell*, 1868, 6 M. (H. L.) 69; *Udny*, 1869, 7 M. (H. L.) 89; both reported in L. R. 1 Sc. App. 307, 441; *Steel*, 1888, 15 R. 896; *Vincent*, 1889, 16 R. 637; *Low*, 1891, 19 R. 115; *Craignish* [1892], 3 Ch. 180; *Wentworth*, 1895, 12 T. L. R. 153; *Paul*, 1893, 1 S. L. T. 175; *Mackenzie's Trs.*, 1894, 2 S. L. T. 88.]

*Definition of Domicile.*—The leading definitions of domicile will be found collected in Story, ch. iii.; Phillimore, iv. ch. 4; Dicey, *Digest of Conflict of Laws*, App. note 3. They are all derived from the celebrated definition of the Roman law found in *Cod. lib. x. tit. 39. 7*. None of them has given entire satisfaction to English judges, but, as Dicey (*Conflict of Laws*, p. 735) points out, those of Story, sec. 43, of Phillimore, sec. 49, and of Kindersley, V. C., in *Lind*, 1859, 28 L. J. Ch. 366, give an explanation of its meaning which is substantially accurate, even if not expressed in the most precise language. That given at the commencement of this article is the definition proposed by Prof. Dicey himself. While accurate, it is no doubt vague, and hardly conveys adequate information as to the meaning of the term. More instructive is the definition substantially adopted by Phillimore from an American case (*Guier*, 1 Binney, 349, n.): “a residence at a particular place, accompanied with positive or presumptive proof of an intention of continuing it an unlimited time.” But indeed it may be doubted whether, for practical purposes, one can describe the legal conception of domicile better than in the words of Mr. Justice Chitty, in the recent case of *Craignish* (*supra*), as “the place or country which is considered by law to be a person's home.”

Into all the definitions of domicile two elements enter—*factum* and *animus*; that is to say, to constitute domicile there must be (1) actual residence within the domain of some particular system of law, and (2) the intention that such residence shall be permanent, or at least not for a limited period. It follows, accordingly, that a domicile once constituted is retained until it is changed, either by the person's own act if he is *sui juris*, or, if he is a dependent person, by the act of some one on whom he is dependent (*Udny*; *Steel*; *Vincent*; *Low* (*ubi supra*); *Alston*, 1896, 24 R. 16).

*Domicile of Independent Persons.*—Every independent person has at any given moment either (1) the domicile which the law ascribes to him at his birth, which is called his domicile of origin; or (2) a different domicile subsequently acquired by his own act, which is called a domicile of choice.

(1) *The Domicile of Origin* of a child born in wedlock to a living father is the domicile of its father at the time of its birth. In the case of an illegitimate or posthumous child, the domicile of origin is the domicile of its mother at the time of its birth. The domicile of origin of a child whose parents are unknown is the place or country of its birth, or, if that too be unknown, the place where it is found. The domicile of origin of a legitimated person may still be a matter of some doubt. As has been explained, the existence of a domicile of origin is a fiction or assumption of law, in order to ensure that no person may be at any time without a legal home in some country, according to the laws of which his legal rights may in many respects be determined. In the general case the fiction is based upon fact, since the home of an infant is usually that of its father. If, being illegitimate, it has in the eye of the law no father, its domicile of origin is, again consistently with fact, assigned to the home of its only relative, viz. its mother. The effect of legitimation by the subsequent marriage of the parents is to place the child in the position it would have occupied if born in wedlock, and a consistent application of the fiction we are dealing with, would assign as the domicile of origin, that of the father at the time of the child's birth. But no reported case has yet so decided. It may, on the other hand, be, as Prof. Dicey (*Digest*, p. 104) points out, that though the child, if still under age, acquires on legitimation the domicile of its father at the time of its birth, its domicile of origin may remain that of the mother. Westlake's statement, s. 247, is compatible with either view. See *Arnot*, 1846, 9 D. 142; *Urquhart*, 1887, 37 Ch. D. 357; *in re Grove*, *Vaucher*, 1888, 40 Ch. D. 216. It may also be noted as still a moot point, whether domicile of origin, even in the case of a legitimate child, means the domicile of the father at the time of the child's birth, or the last domicile imposed by the will of the father or other guardian, who has power to change the domicile of an infant by changing his own. (See also *Craigish*: *Arnot*, *supra*.)

(2) *Domicile of Choice.*—Every independent person can acquire, by his own act and will, a domicile different from his domicile of origin, and called a domicile of choice. "Domicile of choice is a conclusion or inference which the law derives from the fact of a man voluntarily fixing his sole or chief residence in a particular place" (per Ld. Westbury in *Udny*, *supra*). To its acquisition two things are necessary—(1) residence, and (2) intention of permanent or indeterminate residence in a particular place or country. A change of domicile can only be effected *animo et facto*, that is to say, by the choice of another domicile, evidenced by residence within the territorial limits of the jurisdiction of the new domicile. Where a party is alleged to have abandoned his domicile of origin and to have acquired a new one, it is necessary to show that there was both the *factum* and the *animus*; there must be the act, and there must be the intention. "A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there" (per Ld. Chelmsford, *Bell*, *supra*). In short, the acquisition of a domicile of choice is but the technical expression for settling in a new home or country (see *Udny*, *supra*). The concurrence of residence and intention is necessary for the acquisition of a domicile. Nothing less will do, and nothing else is required. There is no

precise definition of the requisite *animus manendi* in the decided cases, but Prof. Dicey deduces from an examination of them the following characteristics:—First: the intention must amount to a purpose or choice. In order that a man may change his domicile of origin, he must choose a new domicile—the word “choose” indicates that the act is voluntary on his part; he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is not his domicile of origin), with the intention of residing there for a period not limited as to time (*King*, 1876, 3 Ch. D. 518). But while the *animus* must be “voluntary,” it is to be judged irrespective of “motive.” Thus, a person may change his domicile, though his object in settling in a new country may be to defeat his creditors (*Robertson, W. N.*, 1885, p. 217); or to obtain divorce (*Carswell*, 1881, 8 R. 901); or sequestration (*Joel*, 1859, 21 D. 926). And, on the other hand, a person may make up his mind to settle in a country for an indefinite time, say for considerations of health, without exhibiting the *animus* necessary to effect a change of his domicile (*Hoskins*, 1856, 25 L. J. Ch. 689; *Jopp*, 1865, 34 L. J. Ch. 212). As was remarked in *Hodgson*, 1858, 12 Moo. P. C. 285: “With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case; and each case must vary in its circumstances; and, moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight.” How far the intention must be distinct and conscious is still undetermined, and different views have been expressed (cf. *Bramwell, B.*, in *Att. Gen.*, 1861, L. J. Exch. 30, 292, with *Wickens, V. C.*, in *Douglas*, 1871, 12 Eq. 645). The degree of definiteness of purpose refers rather to the evidence than to the nature of the intention. Second: the intention must be to reside permanently, or at least for an indefinite period. A limited purpose will qualify the intention, however the residence may be prolonged (*Jopp, supra*; *Doncet*, 1878, 9 Ch. D. 441). Third: it must be an intention to cease to reside in the previous domicile. This follows, of course, from the principle of singleness of domicile already explained. “The intention must be to leave the place where the party has acquired a domicile, and to go to reside in some other place as the new place of domicile (per *Kindersley, V. C.*, in *Lyll*, 1856, 25 L. J. Ch. 749). Fourth: it need not be an intention to change allegiance, or *quatenus in illo exere patriam*. The opinion to the contrary expressed in *Moorhouse*, 1863, 10 H. L. C. 283, has now been pronounced erroneous (see *Udny, supra*; *Brunel*, 1871, L. R. 12 Eq. 298). With regard to the other necessary element, residence (*factum*), its duration is immaterial: “If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile” (per *Ld. Cranworth, Bell, supra*). On the other hand, mere length of residence, apart from the intention, will not of itself constitute a domicile (*in re Patience*, 1885, 29 Ch. D. 976). The two must exist together. “To constitute a domicile, there must be the fact of residence, and also a purpose on the part of the person to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary” (per *Ld. Jeffrey* in *Arnot*, 1846, 9 D. 152). Intention alone, however clearly expressed, is ineffectual. Thus, where an Englishman had acquired a domicile of choice in Hamburg, where he died, the intention not to abandon his English domicile, expressed in a will which he executed in England while on a visit there, was held unavailing to qualify his actual residence in Hamburg *animo remanendi* (re *Steer*, 1858, 28 L. J. Exch. 22). Further,

the acquisition of a domicile of choice is independent of rules of foreign law, that is to say, that a person may establish himself in a foreign country in such a manner as to be deemed by our law to be in fact domiciled there, although he has not complied with the whole requirements of the foreign law, and may not therefore be entitled under it to the full civil rights of a person domiciled there (*Hamilton*, 1875, 1 Ch. D. 257). "But as no one can acquire a personal law in the teeth of that law itself" (Westlake, s. 254), the effect to be given to the domicile so acquired (*i.e.* the possession and exercise of the rights flowing from it) will depend on the law of the country where the person is domiciled. "If by a law passed by competent authority a person resident in any country is declared not to be domiciled there, the provision must receive effect in whatever *forum* it is pleaded, for any country has the right of determining for itself under what circumstances a domicile within it shall be acquired" (per L. J. C. Moncreiff, in *Wauchope*, 1877, 4 R. 949). Of course, if such declarations were contained in a British statute, a contrary effect would be produced (see *Phill. Priv. Int. Law*, iv. ss. 341, 351, 564a, on "Domicile where it is regulated by the State").

*Change of Domicile.*—The domicile of origin is retained until a domicile of choice is in fact acquired (*Steel*, 1888, 15 R. 896, *v.* per Ld. Pres. Inglis). "Every man's domicile must be presumed to continue until he has acquired another sole domicile by residence with the intention of abandoning his domicile of origin" (per Ld. Wensleydale, *Aikman*, 1861, 3 Macq. 877). A domicile of origin, therefore, cannot be simply abandoned. A man may indeed leave the home where he has his domicile of origin without actually establishing another. But, though in fact homeless, he will, until he settles elsewhere, be considered to have his legal home in the country which he has left. He cannot give up or get rid of his domicile of origin until he has in fact changed it by settling in another country (see *Bell and Uday, supra*). A domicile of choice, on the other hand, is retained only until it is abandoned, and the abandonment, like the acquisition, must be both *animo et facto*. Thus, an Englishwoman, who had acquired a French domicile by marriage, resolved, on being left a widow, to fix her home again in England. She embarked on an English vessel at Calais, but was forced by illness to re-land in France, where she shortly afterwards died. It was held that there was no sufficient act of abandonment of her acquired domicile (*Raffenel*, 1863, 32 L. J. P. & M. 203). But if the country of the acquired domicile has been actually left, the domicile will be changed, though no new one has in fact been established. In such a case, if death takes place *in itinere*, the domicile of origin is held to be revived (*Colville*, 1800, M. *recc* Succession, App. No. 1: *Uday, supra*). For "the domicile of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile" (per Ld. Alvanley, M. R., *Somerville*, 1801, 5 Ves. 786). Both an original and an acquired domicile, therefore, are changed by the acquisition *animo et facto* of a new domicile. The difference between them is, that while the former cannot be changed without such acquisition, the latter may be changed by simple abandonment *animo et facto*.

*Domicile of Dependent Persons.*—By a dependent person is meant one who has not full capacity for the acquisition and exercise of legal rights—who is not *sui juris*. Under this category fall (a) minors: (b) married women. (a) *Minors.*—The legal conception of personality involves the existence of free will and independent judgment; and as these are not found in the earliest periods of human life, the law of all civilised countries

fixes an age before which they are not, and after which they are, presumed to exist. This is fixed in British law at the age of twenty-one. But the law of England differs from that of Scotland in holding that the legal incapacity of infancy extends throughout the whole of that period. By Scots law, on the other hand, the immaturity arising from nonage is divided into two periods: (1) one of absolute incapacity, called pupillarity, extending from birth to the age of puberty, which is fixed at twelve in females, and fourteen in males; and (2) one of relative incapacity, called minority, extending to the attainment of majority at twenty-one years of age, in both. This difference may become of importance in questions of domicile: for while the domicile of an English infant is dependent upon that of his father or legal guardian, a Scots minor has the capacity to acquire, and in some circumstances might be held to have acquired, a domicile for himself (see *Arnot, supra*; *Urquhart*, 1887, 37 Ch. D. 337). The domicile of every dependent person is the same as, and changes (if at all) with, the domicile of the person upon whom, as regards domicile, he or she is legally dependent. Thus, the domicile of an infant depends upon, and changes with, that of the father while alive, and with that of the mother after his death. But it cannot be said that, as matter of law, the infant's domicile is identified with that of the widowed mother to the same extent as it is identified with that of the father during his lifetime. In point of fact, no doubt, the infant's domicile in such circumstances usually depends upon, and changes with, that of the mother. And the case of *Pottinger* (1817, 3 Mer. 67) seems to settle the general doctrine, that if after the death of the father the infant continues to live with the mother, and the mother acquires a new domicile, it is communicated to the infant. But she does not in that case, as a matter of law, change the infant's domicile simply by changing her own. Such change, if it takes place, "is not to be regarded as the necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile" (*in re Beaumont*, 1893, 3 Ch. 497). The question whether a guardian, who is not the mother, can change an infant's domicile is undecided. (See *Douglas, supra*.) Both Westlake, s. 250, and Dicey, *Digest of Conflict of Laws*, p. 123, express an opinion in the negative; and the latter adds (p. 124), that "should the question ever arise, it will possibly be held that a guardian cannot change the domicile of his ward, and almost certainly that he cannot do this unless the ward's residence is, as a matter of fact, that of the guardian." It goes almost without saying, that no change will be held to be effected in the domicile of a dependent person by any act on the part of the person on whom he is dependent, done with fraudulent intent, or even, short of fraud, if the law of the new domicile should be less advantageous to the infant (*Pottinger, supra*; *Sharpe*, 1869, 1 P. & M. 617). (b) *Married Women*.—A woman, on marriage, acquires the domicile of her husband. Her domicile during marriage changes with his, and his domicile, at the dissolution of the marriage by death or divorce, remains hers till she afterwards acquires a new one in the same way as other independent persons. As Stair (i. 4. 49) tersely puts it, "her abode and domicile followeth his." According to Ld. Fraser (*H. & W.* ii. 907 and 1254), the rule of law that the domicile of the husband is that of the wife also, ceases when they are judicially separated, but not when they live apart by mutual consent, or have entered into a voluntary contract of separation. About the latter part of this *dictum* there can be no doubt. Actual

residence, said *Ld. Brougham* (*Warrender*, 1835, 2 Sh. & M.L. 154)—residence, in point of fact, signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law that she resides with her husband. A wife cannot have or acquire, *statute matrimonio*, a domicile different from her husband's (per *Ld. Trayner*, *Low*, 1891, 19 R. 123). But it must still be regarded as an open question whether even a judicial separation would give a wife the power to acquire a domicile for herself (*Dicey*, *Conflict of Laws*, p. 127; *Westlake*, *Priv. Int. Law*, s. 253; *Dolphin*, 1859, 7 H. L. C. 390; *Conj. Rts. Act*, 1861, 24 & 25 Vict. c. 86, s. 6). A widow retains her late husband's last domicile until she changes it, and a divorced woman is in this respect in the same position.

*Ascertainment of Domicile.*—The criteria or proofs of domicile are most fully investigated by *Phillimore*, ss. 211–351. They are of two classes: (a) legal presumptions, and (b) the known facts of the case. The ascertainment of domicile starts, first of all, from the person's situation at the moment in question, in regard to which the legal presumption is, that “a person's being in a place is *prima facie* evidence of his being domiciled there” (per *Lord Thurlow*, *Bruce*, 1790, 2 B. & P. 231). It lies, therefore, upon those who say otherwise to rebut this presumption. Thus, a man is *prima facie* domiciled in the place where he is resident at the time of his death. But it may or may not be easy to repel this presumption, as, *e.g.*, by showing that he was there as a traveller, or on a visit, or on some particular business, or for the sake of his health; any of which circumstances may suffice to remove the impression that he was domiciled there at the time. Again, the legal presumption is always against change of domicile, from which it follows that any domicile of a person, once known, is presumed to be retained until the contrary is established, either, in the case of an acquired domicile, by its having been abandoned, or, in the case of a domicile of origin, by proof that a new one has been acquired. The facts which are evidence in a question of domicile are of the most miscellaneous description. No circumstance of an individual's life is too insignificant to be taken into consideration, if it is relevant to prove either of the essential elements of domicile, viz. the fact of his residence in a particular country, and the *animus* or intention which dictated his movements. See cases enumerated by *Prof. Dicey*, *Conflict*, p. 134. In one case not mentioned by *Prof. Dicey* (*in re Marrett*, 1887, 3 T. L. R. 707), where the question was whether a testator had acquired and retained a domicile in Germany, the fact that he had imported a quantity of old Madeira to help him to withstand the climate was considered by *Cotton, L. J.*, important as tending to show an intention to reside permanently in that country. A person's purpose is more certainly inferred from his acts than from his language; but expressions of intention to reside permanently in a given country are, of course, evidence of that intention, and so far are admissible as evidence of domicile (*Hamilton*, 1875, 1 Ch. D. 257), unless contradicted by his acts (*re Steer*, 1858, 3 H. & N. 594; *Brunel*, 1871, 12 Eq. 298). Residence in a particular country has a double significance in regard to domicile. It is not only one of the elements which go to constitute it, and is indeed a necessary element in the case of an acquired domicile, but it is also often the most significant evidence of the other element of domicile, viz. the *animus manendi*. Regarded in this latter aspect, its importance depends upon its duration and mode. Actual residence in a given country is, no doubt, *prima facie* evidence of intention to reside there permanently, but the presumption is at once rebutted by everything in the nature of the

residence which is inconsistent with such an intention. Such are the cases of persons whose residence is to be ascribed to some other motive than the mere desire to live in the particular country, where, *e.g.*, the residence is dictated by legal necessity, as in the case of prisoners, convicts, or refugees (*Burton*, 1828, *Milward's Reps.* 183; *De Bonneral*, 1838, 1 Curt. 856; *Duchesse d'Orleans*, 1859, 1 Sw. & Tr. 253); or official duty, as in the case of ambassadors, consuls, soldiers, and sailors (*Heath*, 1851, 14 Beav. 441; *Att. Gen.*, 1862, 31 L. J. Ex. 397; *Udny*, 1869, *supra*; *Cunningham*, 1884, 13 Q. B. D. 425; *Macreight*, 1885, 30 Ch. D. 165; *Dalhousie*, 1837, 16 Sh. 6, and 1 Rob. App. 475; *Clark*, 1836, 14 Sh. 488; *Hodgson*, 1858, 12 Moo. P. C. 285); or by considerations of health or for study as in the case of invalids and students (*Hoskins*, 1855, *re Garden*, 1896, 11 T. L. R. 167, 8 De G., M. & G. 13; *Steel*, 1891, 9 R. 160); or under other circumstances, which deprive the residence of a free and voluntary character, as, *e.g.* in the case of servants, lunatics, or persons engaged in some special employment (*Bempde*, 1796, 3 Ves Jun. 198; *Urquhart*, 1887, 37 Ch. D. 357). This class of cases, which are frequently described as instances of what is called a "necessary" domicile, is very fully discussed by Prof. Dicey, *Conflict*, pp. 140-154, who points out that the term is in strictness appropriate only to a domicile determined not by the free choice of the party, but by the direct operation of some rule of law, as, for example, in the case of a married woman or a minor. The peculiarity of the residence is not so much that it is involuntary, in the sense of being imposed by some external necessity apart from the will of the party, as that the circumstances of it prevent its being regarded as an indication of free choice, and give no ground for inferring from it the intention of permanency, in other words, the *animus* essential to constitute domicile. A "necessary" domicile is, strictly speaking, a contradiction in terms. And, on the other hand, a residence, undertaken for many of the reasons before enumerated, may be or become of "that fixed and permanent sort which excludes the idea of any other domicile remaining, and necessarily induces a new domicile in the country in which it is established" (*Clark, supra* (*Governor Trapaud's case*)).

*Domicile of Legal Persons or Corporations.*—The regulations of any artificial person in matters concerning only itself, or the relations of its members to it and to one another, must depend on the law from which it derives its existence. That law is its personal law, and hence it may be said to be domiciled in the country of that law (*Edin. and Glasg. Bank*, 1852, 14 D. 557). The idea of domicile relates to the life of the natural man, and is not therefore, properly speaking, applicable to legal or artificial persons. But it may become necessary to assign also to these something corresponding to the domicile of natural persons, as it were an artificial domicile, especially in order to fix their forum. The analogy of natural persons leads us to assign to a corporation as its domicile the place where its corporate life is manifested, where is the centre of its affairs. This depends, as Savigny, s. 354, explains, upon the natural connection of the legal person with the territory, the locality in which its functions are discharged. And this domicile is, of course, entirely distinct from that of the persons who compose the corporation. It is, moreover, a fiction suggested by the fact that a corporation, like an individual, is subject in certain respects to the law of a particular country. But as the intention of residence, which fixes the domicile of natural persons, cannot be predicated of artificial persons, the ascertainment of the domicile of a corporation resolves itself into the inquiry whether, for certain purposes, it is to be considered as resident in a particular



country. The residence and domicile of a trading corporation are determined by the situation of its principal place of business, by which is meant the place where its administrative business is carried on, not necessarily the locality of its manufacturing or other business operations. Thus, a company registered in Scotland or England is domiciled there, although it may have been incorporated to carry on operations in some foreign country. Such a company is liable to pay the income tax, exigible from persons residing in the United Kingdom. Income Tax Act, 1853, Sched. D (*Cresna Sulphur Company*, 1876, 1 Exch. D. 428; *London Bank of Mexico*, 1891, 2 Q. B. 378). In the case of companies registered under the Companies Act, the place of registration is the domicile; and so it has been held that a company whose registered office is in Scotland is "domiciled and ordinarily resident" there in the sense of the rule which regulates service out of the jurisdiction, although it may have subordinate or branch establishments in England (*Jones*, 1886, 17 Q. B. D. 421; *Watkins*, 1889, 23 Q. B. D. 285). But a corporation may for some purposes have more than one domicile, in the same way and to the same effect as an individual; *e.g.*, so as to be subject to the jurisdiction of the Courts of another country than that in which it has its seat (*Carron Company*, 1855, 5 H. L. C. 416).

*Domicile of Citation* expresses a principle of Scots law, according to which a person who has constantly resided at one place within Scotland for forty days is subject to the jurisdiction of the Scots Courts *ratione domicilii*. For purposes of civil jurisdiction over persons, the law of Scotland follows the Roman law as expressed in the celebrated maxim of Huber: *pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur sive in perpetuum sive ad tempus ibi commorantur* (Huber, ii. 728 and 538). In this connection the term "domicile," means no more than the place of residence for the time, whether permanent or temporary. Any other meaning placed upon it would lead to the most inconvenient and absurd results. For if it were necessary in every case to fix where is the domicile of the defender by which his succession, status, and personal rights and privileges are to be regulated before ordinary civil jurisdiction could be exercised over him, it is obvious that one might live for years in a country and carry on the most extensive business without being subject to the ordinary civil tribunals. The general principle, therefore, that residence within a judge's territory gives the judge jurisdiction over the person, being *juris gentium*, it is for each country to determine, as matter of practice, what it will account to be sufficient residence to form a domicile for jurisdiction. To prevent disputes upon this point, a rule is established in the law of Scotland, that where a man has resided for forty days immediately preceding his citation is to be deemed his domicile as to the question of jurisdiction (Ersk. i. 2, 16; Kames, *Law Tracts, Courts*, p. 353; *Jock*, 1889, 21 D. 939, per Inglis, L. J. C.; *International Exhibition*, 1891, 18 R. 843; *Gibb*, 17 March 1897). At that place CITATION (*q.c.*) may be made upon him, in the form for citation, at the dwelling-place introduced by the Act 1540, c. 75, and now regulated by 6 Geo. IV. c. 120, s. 53, and A. S. 14 December 1805.

*Matrimonial Domicile*—residence of married persons within a territory, of such duration and of such a nature as to justify either of them in holding that their matrimonial relations are to be determined by the law of that territory. Both in English and Scots law an opinion has for many years prevailed, that jurisdiction in divorce could not be exclusively rested on domicile in the strict sense, and that redress of conjugal infidelity might be had in the place of residence of the married pair for the time, without inquiring where the husband's domicile of succession might be. Jurisdiction

for divorce has accordingly been sustained in Scotland in a series of cases, on the ground of the "matrimonial home" or the "domicile of the marriage" being within the territory. The doctrine that for purposes of divorce there may be a matrimonial domicile differing from the absolute domicile which will rule succession, was foreshadowed in *Shields*, 1852, 15 D. 144, and was first formulated and applied by the late Ld. Pres. Inglis in *Jack*, 1862, 24 D. 467, where he stated the true inquiry in such cases to be, "Where is the home or seat of the marriage for the time? where are the spouses actually resident if they be together? or if from any cause they are separate, what is the place in which they are under obligation to come and renew or commence their cohabitation as man and wife?" In England, where the indissolubility of an English marriage by any foreign tribunal was for long an accepted principle, the Courts, in like manner, assumed jurisdiction to dissolve a marriage, even if contracted abroad, on the ground of *bonâ fide* residence in England, "not casually or as a traveller" (*Brodie*, 1861, 2 S. & T. 259; *Niboyet*, 1878, 4 P. Div. 1). In neither country, however, did the sufficiency of "matrimonial domicile" to give jurisdiction for divorce receive the approval of the Court of last resort. Its very existence was from the first questioned. In *Jack* (*ubi supra*), Ld. Deas remarked that the phraseology in which it was expressed appeared "calculated to mislead. It is figurative, and wants judicial precision. There is no third domicile involved apart from the domicile of the husband and the domicile of the wife." It was abandoned as a ground of judgment in the case of *Pitt*, 1864, 1 M.P. 106; 4 Macq. 627, on appeal before the House of Lords. And it was expressly disapproved by Ld. Penzance in *Wilson*, 1872, 2 P. & M. 435. Although thus discredited, however, the doctrine still appears in recent Scottish authorities (see Fraser, *H. & W.* ii. 1276, and the interesting account of it in the judgment of Ld. Kincairney in *Dombrowitzki*, 16 July 1895, 22 R. 906); and for England Mr Westlake states the law to be, that "where the husband, being either petitioner or respondent, though not domiciled in England is resident there, not on a visit, or as a traveller, and not having taken up that residence for the purpose of obtaining or facilitating a divorce, the Court has authority to grant a divorce." Neither the Scottish nor English decisions, however, give any indication of the degree of permanence required to constitute matrimonial domicile, or afford any test by which that degree of permanence may be ascertained. The recent judgment of the Privy Council in the case of *Le Mesurier*, 29 June 1895, A. C. 517, has accordingly authoritatively repudiated the doctrine of "matrimonial domicile" in British law, and established the rule that according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. The opinion of Ld. Watson in that case contains a learned discussion of the international law as well as of the municipal laws of both countries on the subject. He concludes that, when carefully examined neither the English nor Scottish decisions establish the proposition that in either country there exists a recognised rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage. He points out that the introduction of so loose a rule into the *jus gentium* would in all probability lead to an inconvenient variety of practice, and would occasion the very conflicts which it is the object of international jurisprudence to prevent. And he expresses the opinion of the Judicial Committee in the words of Ld. Penzance in *Wilson* (*supra*), that, the only fair and satisfactory rule to adopt in this matter of

jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married persons should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer these laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another [see *Juridical Review*, 1895, vol. vii. p. 251].

**Dominant Tenement.**—This term is applied to a tenement whose owner, as such, enjoys a right of servitude over another tenement, called the servient tenement. See under SERVITUDE.

**Dominium directum — Dominium utile.**—These terms of the feudal law denote the respective rights of the superior and vassal under a grant of lands. "The interest which the superior retains to himself in all feudal grants is called *dominium directum*, because it is the highest and most eminent right; and that which the vassal acquires goes under the name of *dominium utile*, as being subordinate to the other, and indeed the most profitable of the two, since the vassal enjoys the whole fruits which grow out of the subject" (Ersk. II. iii. 10). The two rights are also distinguished by the names "superiority" and "property." The term "fee" is often promiscuously used for both.

By the fundamental principle of the feudal system all feudal subjects are held either directly or indirectly of the Crown as paramount superior. The Crown, in making a grant, retains a legal estate or *dominium directum* in the lands which are the subject of the grant. The vassal himself, unless effectually prohibited by a condition made previously to the commencement of the Conveyancing Act, 1 October 1874, can grant a sub-feu of his estate, thereby transferring the *dominium utile* to a sub-vassal, and creating a subordinate and intermediate *dominium directum* in himself. Subinfeudation may thus go on *ad infinitum*.

The two rights are regarded rather as separate estates than as burdens on each other. The superior, by his right of *dominium directum*, is entitled to obtain implement of the conditions of his grant, including payment of feu-duties and casualties. The vassal, by virtue of his *dominium utile*, is entitled, so long as the conditions are fulfilled, to the exclusive use and possession of the lands. His right of property is presumed to extend *a cælo usque ad centrum* within the limits of his grant.

[Stair, II. iii. 7; Ersk. II. iii. 10; Bell, *Com.* i. 711.] See SUPERIOR AND VASSAL; SUPERIORITY; PROPERTY; FEU CHARTER; DISPOSITION.

**Dominium eminens.**—"Every State or sovereign has a power over private property, called by some lawyers *dominium eminens*, in virtue of which the proprietor may be compelled to sell his property for an adequate price, where an evident utility on the part of the public demands it" (Ersk. *Prin.* ii. 1. 1; see also Rankine, *Landownership*, 3rd ed., 318). The most important and extensive application of this principle in modern

times is that provided for under the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 19 (Ferguson's *Deas on Railways*, 143 *et seq.*). See LANDS CLAUSES CONSOLIDATION ACT, 1845; STATUTORY COMPENSATION.

**Dominus litis** is the person who has the real, as distinguished from the nominal or apparent, interest in a law suit, and in virtue of that interest assumes control of the litigation. The nature of the relation and the liabilities attaching to it are fully dealt with by Lord Kyllachy in his elaborate and learned judgment in the case of *Fraser*, 1896, 23 R. 619. The judgment was acquiesced in.

Lord Kyllachy points out that the term is derived from the civil law, and was used to denote the formal pursuer as distinguished from the advocate who appeared for him. It was also used to denote the pursuer or defender proper, as distinguished from the procurator or mandatory in whose name it might happen that the contract of liti-contestation was entered into. As between and among those parties, there were various points that were ascertained. It was held, for example, (1) that no judgment could issue in an action except for or against the formal parties to the action, that is to say, the parties to the contract of liti-contestation; (2) that a procurator, who had as such become a party to the contract of liti-contestation, had right to be relieved by his mandant or principal of all costs and liabilities thereby incurred, and had a preference for such relief against anything which he recovered; and (3) that judgment being obtained against the procurator (as formal pursuer or defender), an action lay upon that judgment against his mandant or principal as the true *dominus litis*. But the civil law apparently did not deal with the case of a latent third party lying behind not only the advocate and the procurator, but also the pursuer or defender proper, for whom the advocate or procurator appeared.

The English rule, so far as any settled rule exists, goes a good deal further than any Scotch rule on the subject. According to the English cases, it is enough to justify a demand for caution (*e.g.* from a pursuer) that some third person has instigated the suit—has some interest in its result—and has contributed to its cost. At least that appears to be so where the third party refuses to sist himself as a party to the suit. The rule, however, is merely one of process, and does not settle the outsider's ultimate liability for the expenses of the suit. As to that matter, all that has been decided in England seems to be that in no case can such liability be enforced in the suit itself, or incidentally to the suit. Whether it can be enforced by a separate action, and if so, on what principles, does not appear to have been considered.

The best-known exposition of the meaning of the term, and of the liabilities attaching to the position, in the law of Scotland is that of Ld. Rutherford in the case of *Mathieson*, 1853, 16 D. 19, where he says: "There may be some difficulty in defining exactly what is a *dominus litis*; but I confess that I very much agree with what has been laid down by your Lordship, and with the definition quoted from the civil law by Ld. Ivory, that he is a party who has an interest in the subject-matter of the suit, and, through that interest, a proper control over the proceedings in the action. Now, it will not make a person liable in the expenses of the action that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit, that while he does both of these things, he shall have some

ultimate consequent benefit in the issue of the suit. But when you go a step further and find a party with a direct interest in the subject-matter of the litigation, and, through that interest, master of the litigation itself, having the control and direction of the suit, with power to retard it or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*; and though another name may be substituted, the party behind is answerable for the expenses." The question, however, comes in every case to be, what kind and degree of interest and control is sufficient to subject the real *dominus* to liability for expenses. As a result of his review of the cases, Ld. Kyllachy concludes that the principle which underlies and explains them is the doctrine that a principal, disclosed or undisclosed, must make good the engagements and answer for the acts of his agent, acting within the scope of the latter's authority. The substance of the matter is that a person becomes a party to a suit, and by doing so comes under an implied obligation to his adversary to perform the judgment, and *inter alia* to pay such expenses as may be awarded against him. That is an obligation in which his adversary is creditor; and it is of no importance whether it arises by contract, or *quasi contract*, or by force of law. But an obligation so incurred may, like other obligations, be incurred on one's own behalf or on behalf of another. And if the latter be the case, the position simply is that the party to the suit and the party behind him stand to each other in the relation of principal and agent, with all the liabilities to third parties which that relation involves. That being so, the question in each case is not whether the alleged *dominus litis* is interested in the action, or has advised it, or has financed it, or has exercised greater or less control over its progress: the question is whether, in initiating and conducting the action, the nominal pursuer (or defender, as the case may be) was acting not as principal, but as an agent. In order to establish the actual position of matters, the Court will not sustain the plea of confidentiality and refuse a diligence to recover documents for the purpose of instructing the real relation between the nominal litigant and the alleged *dominus* (*Fraser*, 1895, 3 S. L. T. 333).

The plea is not as a rule properly prejudicial: and if the nominal litigant has himself a title and an interest, however slight, in the subject-matter of the action, his adversary cannot in general insist that he find caution, or that the real *dominus* be sisted as a party. His remedy is to bring a separate action for the expenses which he has disbursed against the real *dominus* at the conclusion of the suit (*Hepburn*, 1874, 1 R. 875). There are, however, certain cases where a defender may insist either upon caution or that the *dominus litis* be sisted, *e.g.* where the pursuer has alienated or become divested of the subject of the litigation, the transferee may be required to sist himself (*Fraser*, 1839, 1 D. 882; *Waddell*, 1843, 6 D. 160); or where the pursuer is divested by bankruptcy, he must either get his trustee to sist himself or find caution (see CAUTION, JUDICIAL); or in popular actions in which any member of the public may insist, *e.g.* in declarator of right of way, if a man of straw is put forward as pursuer, the Court may ordain him to find caution, or that the persons behind him should sist themselves (*Jenkins*, 1869, 7 M. 739; *Potter*, 1870, 8 M. 1064). The father of a pupil or minor who brings or concurs in an action on behalf of his child may be found liable in expenses if he has the real control of the action (*White*, 1894, 21 R. 649; *Fraser*, 1892, 19 R. 564). But a husband who concurs in his wife's action, as her curator and administrator-in-law, does not thereby subject himself to liability for expenses (*Whithead*, 1893, 2 R. 1045).

[See Mackay, *Practice*, i. 294, 312, 316, ii. 579; *Manual*, 136, 664.]

**Donatio in Roman Law.**—*Donatio* comprises every act of liberality by which one person increases the property of another. *Donari videtur, quod, nullo jure cogente, conceditur* (D. 50. 17. 82). It is essential that the giver should give with the purpose that the property of the receiver be increased by the gift, i.e. there must be the *animus donandi* (D. 39. 5. 1. pr.). In the time of the classical jurists, a mere agreement to give, *pactum donationis*, could not be enforced by action. In order to be legally valid it was necessary either that the agreement be embodied in a *stipulatio*, or that it be followed by actual delivery. By an enactment of Justinian, however, a *pactum donationis* was made valid. In other words, a contract to give, whether written or oral, became enforceable at the instance of the donee. From an early period in Roman law the power of donation was restricted by a *lex Cincia*. Certain classes of persons (*exceptæ personæ*) were excepted from the operation of the *lex*; and the limitations imposed by the *lex* on the amount which might be given did not apply if the gift were conveyed by *mancipatio* or *in jure cessio*. In the later law, when *mancipatio* and *in jure cessio* were obsolete, a new form called *insinuatio* was used for perfecting gifts. This consisted in a declaration of the gift before a public official, or the registration of it in Court. Justinian only required *insinuatio* for gifts above 500 *solidi* in amount. Donations not followed by *insinuatio* were void only in so far as they exceeded that sum. In Roman law grossly ungrateful conduct on the part of the beneficiary, e.g. compassing the donor's death or foully defaming him, formed a ground for a rescission of the gift (*Inst.* ii. 7 : D. 39. 5 ; *Cod.* 8. 54).

A *donatio inter virum et uxorem* was, as a general rule, void, and could be recovered at any time. Such a *donatio*, however, was valid where it was given solely for maintenance, or where it did not involve the transference of a substantial amount of property (D. 24. 1. 40. 42). Further, if the donor, being entitled to revoke the gift, died before the donee without revoking it, the gift became valid (D. 24. 1 ; *Cod.* v. 16).

*Donatio mortis causâ* is a gift made in contemplation of death, and conditional on the donee surviving the donor. A *donatio mortis causâ* in some respects resembled a *donatio inter vivos*, but, in the Justinian law, it was governed almost wholly by the law applicable to legacies. It differed from a legacy chiefly in being a present gift (*præsens præsentî dat*, D. 39. 6. 28), and not a mere charge on the *hereditas*. On the other hand, it did not deprive the donor of the right to his property, and practically only imposed a burden on his heir (*Inst.* ii. 7. 1). A *donatio mortis causâ* was revocable by the donor at any time during his life. A classification of *donationes mortis causâ* is given in D. 39. 6. 2. In course of time most of the rules relating to legacies were made applicable to donations. No person could make or take a *donatio mortis causâ* unless he were capable of making or taking under a testament. Property forming the subject of such a gift was liable for the debts of the deceased as if it were part of the *hereditas*, so that the gift was effectual only if sufficient assets remained after deducting the debts. The gift was subject to the deduction of the Falcidian fourth by the instituted heir, and could not be used as a means of defeating the claims of *liberi* (D. 39. 6 ; *Cod.* viii. 57).

*Donatio propter nuptias* was a gift made by a man, when about to marry, to his future wife, as an equivalent to the *dos*. It was originally called *donatio ante nuptias*, because, as a *donatio* between husband and wife during marriage was void, its constitution was necessarily antenuptial. In the later law the *donatio ante nuptias* might be validly increased after marriage; and, finally, Justinian enacted that it might be validly constituted

after the marriage. The old name having thus become a misnomer, the term *donatio propter nuptias* came into use. The main purpose of a gift of this sort was to make a provision for the wife in the event of the dissolution of the marriage. During the subsistence of the marriage the husband managed the fund and applied its profits *ad onera matrimonii ferenda* (*Inst.* ii. 7. 3: *Cod.* v. 3).

**Donation.**—A pure donation is the free gift *inter viros* of any subject by one who is under no antecedent legal obligation to give it.

Acceptance by the donee is not requisite to complete the donation: nor is knowledge on his part in all cases necessary, for donation may be made by delivery to a third party on behalf of the donee.

The subject of donation may be any right capable of transmission: heritage, moveables corporeal or incorporeal. Donations of cash may be made by means of a cheque (*Milne*, 11 R. 887), or a bill (*Durie's Err.*, 20 R. 295), or a deposit receipt (*Dawson*, 19 R. 261). A share in a pawn-broking business has been the subject of donation (*L. A. v. McCourt*, 20 R. 488); so also the donee's own I. O. U. (*Anderson's Trs.*, 11 R. 35), an obligation to pay an annuity after the donor's death (*Duguid*, 9 S. 844), a wife's renunciation of her legal rights (*Dixon*, 5 S. 266), and her acceptance and judicial ratification of a provision in lieu of her legal rights (*McNeill*, 8 S. 210).

Donation, to be complete, requires, *first*, transmission of the subject *habili modo* from the donor to the donee, or to some one on his behalf, and, *second*, proof or legal presumption of the *animus donandi*.

The transmission must be *habili modo*. Thus, in the case of corporeal moveables, actual delivery is sufficient: in the case of heritable subjects, or subjects which require writing for their transmission, delivery of the proper deed or writing must be made. So also if the donation be immediate, not of the subject, but of an obligation to deliver the subject at some future time, as in the case of a bond of provision, the delivery of the deed of obligation completes the donation (*Duguid*, 9 S. 844). It is essential that the donor should divest himself of the subject, put it entirely beyond his own control and his own use, and put it in possession of the donee or some one on the donee's behalf (*Milne*, 11 R. 887: see also *Thomson*, 11 R. 453: *McNicol*, 17 R. 25).

The transmission may be constructive. Thus it has been held that the expression of an intention to give, followed by an overt act by the donor in pursuance of that intention, may constitute donation, although there has been no actual delivery of the subject of the gift (*Smith*, 12 R. 186: *Shaw*, 19 R. 997). Both these cases were instances of the expression of the intention being made by entries in the donor's private books. In *Shaw's* case the overt act was the delivery of a letter, stating the entry, to the donee's guardian. In *Smith's* case the entry in the book was presumed to have been delivered, the donee being the wife, and the donor being the natural custodian of his wife's papers.

But complete transmission must be conjoined with the *animus donandi*. In some cases this is presumed, and the onus of proof is on the party disputing donation, but in the ordinary case the presumption of law is against donation. If the delivery of the subject can be attributed to any other relationship than that of donor and donee, it will be so attributed, for no one is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss (*Bankt.* i. 9. 20: *Stair*, i. 8. 2).

This presumption may be overcome by strong and unimpeachable evidence (*Sharp*, 10 R. 1000), and clearer evidence is required in the case of pure donation than in the case of donation *mortis causa* (*Dawson*, 19 R. 261). The onus of proving that the transaction was donation lies on the person alleging himself to be donee (*Durie*, 9 M. 969), and his evidence is not enough, even when corroborated by others who also benefit by the gift or are subject to the donee's influence (*Dawson*, 19 R. 261).

While the proof of the transmission of the subject must be *habili modo*, the proof of the *animus donandi* which is necessary to overcome the presumption against donation may be parole, and proof on both these points must be complete. In the ordinary case the transmission is complete, as in the case of an endorsed deposit receipt. Possession of such a document is ascribed to trust or mandate, and a complete proof is necessary of *animus donandi* (*Durie*, 9 M. 969). On the other hand, even although there be complete proof of the *animus donandi*, it will not make donation unless the transmission be complete (*McNicol*, 17 R. 25, unendorsed deposit receipt; *Durie's Err.*, 20 R. 295, insufficiently stamped bill; *Milne*, 11 R. 887, cheque payable after death).

The application of this presumption is manifold. Thus a debtor handing money to his creditor is presumed to do so in extinction of his debt. *Debitor non præsimitur donare*. And if a person receives from another money, cheque, or endorsed deposit receipt, his possession is ascribed to trust or mandate to apply or collect the money for the other's benefit. If one of several joint obligants pays the whole debt, he is not presumed to do so as a donation to the others, and a right of relief is given to him against each for his share. When goods are delivered to or by a trader, this delivery is presumed to be in the ordinary course of business, and this principle applies to every subject when delivered to or by anyone whose business is in dealing in such subjects.

The presumption against donation is overcome in certain cases by considerations arising from the relations of the parties. Thus, where advances are made with all the appearance of being made as charity, such as advances to a pauper, they are presumed to be donations (*McLachlan*, 6 S. 433; *Henderson*, 29 Sc. Jur. 559). So where aliment is given to a person of full age, the presumption is in favour of donation, on the ground that if the person giving the aliment had not meant it as donation, he would have stipulated with the other for recompense (see *McGaw's*, 10 R. 157). But if the person giving aliment be an innkeeper, or one whose business is the entertainment of strangers, this consideration is not recognised, and the ordinary rule against presuming donation is observed (*Forrest*, M. 9713). In this respect, a minor whose father is alive and accessible (*Chisholm*, M. 11429), or who has tutors and curators (*L. Ludquhairn*, M. 11425; *Gordon*, M. 11426), is considered to be in the same position as a person of full age, for the person giving the aliment could have stipulated with the father or the tutors and curators. On the other hand, if the minor's father be not accessible, so that no bargain can be made with him, or if the minor have no tutors and curators and have independent means, the presumption against donation holds, and the giver of aliment has a claim for the board given. In the case of similar advances made for aliment or outfit by mothers or grandmothers (*Guthrie*, M. 10137), uncles (*Campbell*, 5 S. 219), or brothers (*Drummond*, 12 S. 342; *Forbes*, 8 M. 85), they are presumed to have been made *ex pietate*, especially where the recipient has little or no estate, and the donor is apparently in a position to spare the amount without pinching. Where a minor has a sufficient independent estate, the presumption is against



donation, even in the case of aliment given to him by his father; and in the case of a child alimented by his mother *ex pietate* succeeding to a sufficient estate, his mother has a claim for all advances made subsequent to the date of his succeeding (*Lugton*, M. 11435; *Gowrlay*, M. 11438), but not for those made prior to that date (*Home*, M. 412). A person entitled to an allowance for the maintenance of a minor, who continues to maintain him after he comes of age, has a claim for his board, even without any stipulation having been made, so long as he maintains him (*Spence*, M. 11437). An eldest son maintaining his brothers and sisters in his family is entitled to board, which he may retain out of interest on their provisions due by him, even though they were of age when they came to reside with him (*Gordon*, M. 11161).

In the case of advances made to children, the presumption is in favour of donation, and the person alleging loan must prove it (*Malcolm*, 17 R. 255); and even where the father is already debtor to his children, the presumption is in favour of donation, and provisions which he may make for them are understood to be additions to the children's patrimony, and not in satisfaction of prior bonds of provision (*Clark*, 2 S. 313; *Kippen*, 3 Macq. 203).

Where there is complete transmission and *animus donandi* proved or presumed, the donation is complete, and is irrevocable (*Duguid*, 9 S. 844; *McGibbon*, 14 D. 605). In this respect the law of Scotland differs from the Roman law, by which a donation, though perfected by delivery, was revocable for ingratitude on the part of the donee, but only during the lifetime of donor and donee. Being an action *ex delicto*, the claim of revocation did not transmit against the heir of the delinquent, nor did it transmit in favour of the donor's heir, for a presumption of forgiveness was held to arise from the donor's silence during his life. This right of revocation was said by the institutional writers to be also the law of Scotland (*Stair*, i. 8. 2; *Bankt.* i. 9. 4; *Ersk. Inst.* iii. 3. 90); but there are no recorded decisions of the Courts giving effect to it, and it is doubtful whether it would now be upheld (*Bell*, *Prin.* s. 64). In the case of *Duguid* (9 S. 844), though the facts disclose a case of ingratitude, the plea was not taken.

In some other respects the law of Scotland as to donation differs from the Roman law. See DONATIO IN ROMAN LAW.

*Beneficium competentie* is conferred by the law of Scotland on fathers and grandfathers against their children and grandchildren, even although the result should be to reduce the children to indigence; but it is not extended to the case of strangers, or to collateral relations, or even to the case of brother and sister (*Ersk. Inst.* iii. 3. 89; *Bankt.* i. 9. 8). In the earlier cases this right was not allowed (*Dick*, M. 1389; *Cairns*, M. 1389); but later decisions have established its applicability to the limited extent stated (*Bontcin*, M. 1390; *Hogg*, M. 1390, where the whole subject was fully discussed, although the decision was afterwards reversed, 1 Pat. 469; *Hardie*, 1 July 1813, F. C.).

The *conditio si sine liberis decesserit*, by which, if one made a gift of all, or the greater part, of his estate when he had no children, and afterwards came to have children, the gift became void, upon the presumption that if the donor had anticipated having children of his own he would not have made it, has never been applied in Scotland in cases of *inter vivos* donation perfected by delivery, though it has been recognised to some extent in cases of testamentary settlements and donations *mortis causa*.

Remuneratory donations fall under the definition given above for pure donations; but they differ in this, that while the donor is under no legal obligation, he is under a moral obligation, to make the gift. They differ

from pure donations only in respect that they are not revocable; but as the only pure donations which are revocable by the law of Scotland are those *inter virum et uxorem*, reference is made to where they are dealt with later.

[Stair, i. 8. 2.; Bankt. i. 9. 1.; Ersk. *Inst.* iii. 3. 88; Dickson on *Evidence*, i. s. 158; McLaren on *Wills*, i. 430.]

**Donations Inter virum et uxorem.**—*What Donations are Revocable.*—The law of Scotland has adopted the rule of the later Roman law, that donations made by one of the spouses to the other are valid if not revoked, but may be revoked at any time by the donor (*D.* 24. 1. 32). The Married Women's Property Act, 1881 (44 & 45 Vict. c. 21), s. 8, saves the law as to donations. The doctrine is not applied to mere presents, such as birthday gifts of reasonable value (*D.* 24. 1. 31. 8; Fraser, *H. & W.* ii. 926). But it applies to all transactions by which one spouse is materially enriched at the expense of the other. The case which most frequently arises is where the legal or conventional rights of the spouses are varied by a post-nuptial contract or mutual settlement, or by the testament of one of the spouses. If the parties were married without any antenuptial marriage contract (see MARRIAGE CONTRACT), the wife acquired a right, not defeasible by the husband's will, to her TERCE (*q.v.*) and JUS RELICTÆ (*q.v.*), and the husband a similar right to his JUS RELICTI (*q.v.*) and to his COURTESY (*q.v.*), subject to the conditions which attach to that right. A renunciation of any of these rights during the marriage, without receiving something like a fair equivalent, is a revocable donation. Similarly, the parties, by an antenuptial marriage contract, may have substituted conventional provisions for their legal rights. If so, any alteration of these conventional provisions during the marriage, if greatly to the advantage of one spouse, may be revoked by the other as a donation (*Rae*, 1875, 2 R. 676; see *Cooper*, 1885, 12 R. 473; 1888, 15 R. (H. L.) 21). But in cases of this class where there is value received on both sides, it is settled law that a spouse cannot revoke unless the other has gained to a considerable extent. The inequality must be gross (*Hepburn*, 1814, 2 Dow, 342; *Mitchell*, 1877, 4 R. 800; *Mcville*, 1879, 6 R. 1286; *Beattie's Trs.*, 1884, 11 R. 846). The value of the rights of each is to be estimated as at the dissolution of the marriage (*Hunter*, 1827, 5 S. 266; *affd.* 1831, 5 W. & S. 455; *McNeill*, 1829, 8 S. 210; *Thomson*, 1838, 16 S. 641; *Blaikie*, 1838, 1 D. 18; Fraser, *H. & W.* ii. 928. But see *Nisbett*, 1835, 13 S. 517; *Mitchell*, *ut supra*; M. Bell, *Convey.* ii. 916). It is a donation if a wife renounces her legal rights for provisions subject to forfeiture on her second marriage (*McNeill*, *ut supra*; *Marshall*, 1826, 4 S. 581; *affd.* 3 W. & S. 37); and the removal by the husband of such a condition, imposed by an antenuptial contract, is a donation by him (*MacLachlan*, 1839, 1 D. 1177).

In questions of donation, the Court looks at the essence of the transaction, and, if satisfied that one spouse greatly benefits, will allow the other to revoke, though the deed may attempt to cloak the donation under the form of a conveyance to a third person (*Glasford*, 1634, Mor. 6106; *Jardine*, 1830, 8 S. 937; *Rae*, *ut supra*). The narrative of the deed will not be treated as in any way conclusive, and a declaration that the donation shall be irrevocable will be disregarded (*Jardine*, *ut supra*). But a *bonâ fide* donation by one spouse in favour of the children of the other by a former marriage is not revocable (*Muir*, 1663, Mor. 6107; Bell, *Prin.* s. 1616); and a wife who gives her separate estate to her husband's creditors

cannot revoke it from them, though she may claim reimbursement from him (*Standard Prop. Incest. Co.*, 1877, 4 R. 695). A wife who allows her husband during a course of time to deal with the income of her separate estate as if it were his own money, cannot revoke income which has been in this way consumed *in bonâ fide* (*Edward*, 1888, 15 R. (H. L.) 37). Provisions made in a contract of voluntary separation cannot be revoked *stante matrimonio* without an offer to adhere, but are revocable after the dissolution of the marriage (*Dickson*, 1827, 5 S. 266; *affd.* 5 W. & S. 455; *Nisbett*, 1835, 13 S. 517).

*A Reasonable Provision is not a Donation.*—A reasonable provision for a widow is not a revocable donation if the husband was solvent at the date of the deed, and the wife was not otherwise provided for; and if excessive, it is only revocable *quoad excessum* (*Craig*, 1860, 22 D. 1211; *rev.* 1861, 4 Macq. 267; *Gibson*, 1877, 4 R. 867; *Melville*, 1879, 6 R. 1286; and see *Mudie*, 1896, 23 R. 1074). But this does not apply to a provision which supplements rights given by an antenuptial contract (*Rae, Jardine, ut supra*; *Ersk.* i. 6. 30. But see *Fraser, H. & W.* ii. 938). And no provision to take effect *stante matrimonio* is good against the husband's creditors (*Miller*, 1871, 10 M. 107; *affd.* 1875, 2 R. (H. L.) 62; *Kemp*, 1842, 4 D. 558; *Dunlop*, 1865, 3 M. 758; *affd.* 1867, 5 M. (H. L.), 22; see *Elliott*, 1894, 21 R. 955, 22 R. (H. L.) 26). And it is probable that the same rules would be applied to post-nuptial provisions made by the wife in favour of the husband (*Chalmers*, 1710, Mor. 6056; *Stirling*, 1716, Mor. 6111; *Ersk.* i. 6. 30; *Fraser, H. & W.* ii. 943).

A "reasonable provision" means in most cases "reasonable" when the marriage is dissolved, and it is possible to compare the rights acquired under the deed with the legal rights which were surrendered (*Hunter*, 1831, 5 W. & S. 455; *Thomson*, 1838, 16 S. 641; *Mitchell*, 1877, 4 R. 800; *Fraser, H. & W.* ii. 928. But see *Nisbett*, 1835, 13 S. 517; *M. Bell, Convey.* ii. 916).

*By whom and when Revocation may be made.*—The donor may revoke at any time, even after the death of the donee (*Rae*, 1875, 2 R. 676). If a spouse become insane, and has a *curator bonis*, the curator may exercise his ward's right of revocation (*Blaukie*, 1838, 4 D. 18). The right does not transmit to the donor's heirs or representatives (*Dunlop*, 1863, 2 M. 1; *Edward*, 1885, 15 R. (H. L.) 37; *Ersk.* i. 6. 32). The creditors of the donor may revoke during his life, or after his death (*Honeyman & Wilson*, 1886, 14 R. 163).

*How Revocation is made.*—Revocation may be express or implied, and does not need to be intimated to the donee (*Ersk.* i. 6. 31; *Moffat's Trs.*, 1821, 1 S. 195). Sequestration revokes *ipso facto* all revocable donations (*Kemp*, 1842, 4 D. 558; *Craig*, 1860, 22 D. 1211; *rev.* 1861, 4 Macq. 267). A subsequent grant of the *res donata* to a third party is an implied revocation (*Inglis*, 1676, Mor. 6131). But revocation will not be implied from a subsequent disposition *omnium bonorum*, the presumption being that general words were not intended to cover the special subject (*Handyside*, 1699, M. 11349). But this is a question of intention in each case (*Walker's Exrs.*, 1878, 5 R. 965). If the donor imposes a burden on the *res donata*, being a heritable subject, this only revokes the donation *pro tanto*. The donee takes it *eum onere* (*Johnstone's Trs.*, 1896, 23 R. 538). If the donee be divorced, the donation is revoked by the fact of divorce (*Ersk.* i. 6. 31; *Fraser, H. & W.* ii. 952).

*Right to Revoke may be barred.*—The right of a surviving spouse to revoke may be barred by homologation after the dissolution of the marriage (*Rae*,

*ut supra*; see *Donaldson*, 1886, 13 R. 967). The donee cannot plead prescription (*Turnbull*, 1697, Mor. 10726; *Fraser, H. & W.* ii. 959). Nor is a wife barred from revoking by having judicially ratified the donation (Ersk. i. 6. 35; *Fraser, l.c.*). A divorced spouse cannot revoke a donation (see DIVORCE).

*Nature of Donee's Right.*—The donee is proprietor of the *res donata*, but subject to the resolutive condition. He cannot give to an assignee a higher right than his own. But in the case of moveables, an onerous assignee, who has acquired them in ignorance of the condition under which the donor possessed them, is protected against revocation by the donor (Bell, *Prin.* 1617; *Fraser, H. & W.* ii. 961). It seems that if the *res donata* perished without the fault of the donee, the loss would fall on the donor, and that the donee is entitled to consume the fruits as a *bonâ fide* possessor, these not being revocable (*Fraser, l.c.*; see *Edwards, ut supra*).

As to evidence of donation, see DONATIONS, and cases in Walton, *H. & W.* 134 *seq.*

[See *Dig.* 24. 1. 32; *Stair*, i. 4. 18; *Bankt.* i. 5. 95; *Ersk.* i. 6. 29; *Bell, Prin.* 1616; *Fraser, H. & W.* ii. 916; *Walton, H. & W.* 125.]

**Donation Mortis causa.**—By the Roman lawyers (*Dig.* 39. 6. 2) three kinds of donation *mortis causa* were distinguished, but the doctrine as known to the law of Scotland, and as explained by Bankton, does not precisely answer to any one of them. “A donation *mortis causa*,” says Bankton (i. 9. 18), “is a deed whereby one, in contemplation of his death, gives anything to another, or grants a right in his favour, revocable at the granter’s pleasure.” He adds that “the characteristics of these donations are that the giver therein prefers the grantee to his heirs, and prefers himself to both.” It would seem, therefore, that the Scottish doctrine “follows more the general definition of the *Institutes* (2. 7. 1), which distinguishes donation *mortis causa* from donation *inter vivos* on the one hand, and legacy on the other” (per Inglis, L. P., in *Blyth*, 1885, 12 R. at p. 680). According to Erskine (iii. 3. 91) this kind of donation is little known in practice; but although the doctrine was not finally settled and defined till the case of *Morris* (1867, 5 M. 1036), it was undoubtedly recognised in several early cases (*Whitefoord*, 1742, Mor. 8072; *Mitchell*, 1789, Mor. 8082; *Fyfe*, 1847, 9 D. 853).

As defined by Ld. Pres. Inglis (*Morris, supra*, 5 M. at 1041), donation *mortis causa* is “a conveyance of an immoveable and incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and failing such revocation, then for the grantee on the death of the granter.”

Such being the nature of the right, it is clear that it cannot be made effectual during the granter’s life against his creditors, although on his death it will receive effect against his heirs and executors (*Bankt.* i. 9. 18); and where there is a deficiency of funds, it will be preferable to legacies upon the executry (*Bankt.* i. 9. 16). It may be added that donations are rather presumed absolute than *mortis causa*, and therefore, though made in contemplation of death, if they are irrevocable they are simple gifts (cf. *Galloway*, 1884, 11 R. 541).

While in theory it is possible to make a donation *mortis causa* of any subject, heritable and moveable, the cases which have come before the

Courts relate almost entirely to sums of money contained in bank deposit receipts. As a deposit receipt is not an assignable or negotiable instrument, no testamentary effect can be given to such documents (*Cuthill*, 1862, 24 D. 849; *Watts Trs.*, 1869, 7 M. 930; *Miller*, 1874, 1 R. 1107; *Jamieson*, 1880, 7 R. 1131; *Counell*, 1886, 13 R. 1175; *Macdonald*, 1889, 16 R. 758).

Delivery of a deposit receipt *animo donandi* by the creditor therein, without endorsement, is not effectual as a donation *mortis causa* (*McNicol*, 1889, 17 R. 25; cf. *Dawson*, 1891, 19 R. 261). Neither is endorsement of a deposit receipt and delivery sufficient *per se*, for endorsement and delivery only implies a mandate to the endorsee to draw the money, which falls on the death of the endorser. But a receipt taken originally in the name of the claimant, or of the defunct and claimant jointly, receives more favourable consideration than a receipt in the name of the defunct himself, endorsed (*Anderson*, 1883, 11 R. 15; *Malcolm*, 1889, 17 R. 255).

To determine whether or not a deposit receipt in the hands of the endorsee has been given him as a donation *mortis causa*, three things are necessary: (1) there must be the *animus donandi*, (2) delivery, and (3) the gift must be made in contemplation of death.

(1) As it is presumably in accordance with the nature of a donation *mortis causa* that the donor prefers the donee to his heir and executor, and himself to both, in every case the first requisite is to determine with what intention the gift was made.

As a matter of experience, this has always been the chief topic of contention in the cases that have come before the Court, the question requiring to be determined being: Was the deposit receipt delivered *animo donandi*, or in trust for administration? In the leading case of *Sharp* (1883, 10 R. 1000) the decision was against donation, as the expressions said to have been used by the deceased were *not inconsistent* with the deposit receipt and its contents having been given to the defender for purposes of administration only. Generally, it may be said that as the presumption of law is against donation, it cannot be held to be established "without a verbal or written declaration on the part of the donor of his intention to make a gift to the person to whom the subject is to be transferred" (*McLaren on Wills*, i. 432).

(2) A mere declaration of intention, however, although clearly proved, does not effect donation without a transference of possession, or of the title to demand possession. Delivery, or constructive delivery, must always be established. There must be an immediate transfer of the property (per Ld. Pres. Inglis in *Morris*, *ut supra*). Without delivery a donation *mortis causa* would just be a verbal legacy, and would not be good at all (per Ld. Young in *McNicol*, 1881, 17 R. 25). In short, with one doubtful exception (*Crosbie*, 1880, 7 R. 823), no donation has been held to be proved against the representatives of an alleged donor without evidence of the delivery of the document of debt (cf. Ld. Pres. Robertson in *Dawson*, 1891, 19 R. p. 272). Written evidence, however, is not required to establish the fact of delivery. Parole evidence is sufficient. "Whatever is sufficient in law to constitute and prove such a transfer of a deposit receipt, must be sufficient to make the donation effectual" (Ld. Pres. Inglis in *Morris*, *supra*): and the property in moveables being transferable onerously by bare tradition, his Lordship argued that it would be most unjust and against all the principles and analogies of law to hold that the gratuitous transference was ineffectual without writing, simply because the recipient acknowledged that he received the gift under a condition (cf. *Wright*,

M. 8082). In all subsequent cases this view of the law has been upheld (*Ross*, 1871, 10 M. 187; *Jamieson*, 1886, 7 R. 1131; *Crosbie*, 1880, 7 R. 823; *Sharp*, 1883, 10 R. 1000; *Thomson*, 1884, 11 R. 887; *Galloway*, 1884, 11 R. 541; *Blyth*, 1885, 12 R. 674; *CConnell's Trs.*, 1886, 13 R. 1175).

The parole evidence, however, must be "strong and unimpeachable" (Ld. Pres. Inglis in *Sharp*, *supra*), and in general some independent corroboration is required (Ld. McLaren in *Sharp*, *supra*).

Actual delivery *de manu in manum* is not required: it is enough that a title be given to the donee. Thus where money was lodged in bank in name of the donee, the *animus donandi* being proved, constructive delivery was inferred, as no further delivery was possible (*Gibson*, 1872, 10 M. 923; cf. *Crosbie*, 1880, 7 R. 823; and *Thomson's Err.*, 1882, 9 R. 911).

(3) There has been considerable difference of opinion on the Bench in regard to the question whether or not it was essential that a donation *mortis causa* should be made under an immediate apprehension of death. Ld. Deas, in *Morris' case* (*supra*), assumed the affirmative, and distinctly gave it as his opinion that a donation *mortis causa* takes effect only in the event of death occurring from the existing illness, revocation being inferred in case of recovery. The same views were maintained by Lds. Young and Craighill in *Milne's Err.* (1884, 11 R. 887), but in the case of *Blyth* (1885, 12 R. 674), where the question was directly raised, it was answered in the negative. In that case Ld. Pres. Inglis, after an exhaustive examination of all the sources of authority in the Roman law and in the law of Scotland, said: "I cannot find in any of our authorities, with the exception of the *dicta* relied on by the appellants (*i.e.* Ld. Deas in *Morris*, and Lds. Young and Craighill in *Milne's Err.*), a recognition of the necessity of a present imminent peril to life as a condition of the right or power to make a donation *mortis causa*."

In *Whitefoord's case* (1742, M. 8072) the plea of *donatio mortis causa* was sustained, although the donor was apparently in his usual health, under no apprehension of speedy death, and lived for two years after the gift. In *Fyfe's case* (1847, 9 D. 853), again, the donor survived the gift for nine months, and yet the plea of donation *mortis causa* was upheld.

The extremest case of all, however, was that of the *Lord Advocate v. Galloway* (1884, 11 R. 541), where a donation *mortis causa* was sustained as good though the donor survived the gift for three years. The state, however, of the donor's health, his prospect of life, and, above all, his own feelings and belief in this matter, are relevant and important considerations in such a case, as bearing on the proof of the *animus donandi*, and also as tending to show whether the gift is meant to be absolute or *sub modo*" (per Ld. Pres. Inglis in *Blyth*, 1885, 12 R. at 680).

Property taken as a *donatio mortis causa*, made by any person dying after 1 June 1881, was made liable to account duty in lieu of inventory duty in 1881, under 44 Vict. c. 12, s. 38, and in 1894 it was made liable to entail duty by 57 & 58 Vict. c. 30, s. 2 (1) (*c*). It had previously been liable in legacy duty under 8 & 9 Vict. c. 76, s. 4, but not to succession duty under 16 & 17 Vict. c. 51 (cf. *Galloway*, 1884, 11 R. 541).

**Donation, The Presumption against.**—"It is a rule in law, *Donatio non presumitur*; and therefore, whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly. Whence ariseth that other rule of law, *Debitor non presumitur donare*" (*Stair*, i 8. 2; iv. 45. 17 (14)). The ground of the presumption is sufficiently

obvious;—"No person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss" (Ersk. iii. 3. 92). It will be observed that neither of the broadsides above mentioned states the presumption correctly. The principle is not merely that there is no presumption in favour of donation, but that there is a presumption against it (Dickson, i. p. 132, note, p. 139, note). The modern rule is stated by Ld. Fullerton (*British Linen Co.*, 1849, 11 D. 1004) as follows: "When we say that donation is not to be presumed, the only practical result is that it must be sufficiently proved; that there must be such a preponderance of evidence in favour of it, as to render any other supposition inadmissible according to the ordinary probabilities of dealing between the parties." And in a later case (*Heron*, 1851, 14 D. 30) he observes that "when donation is averred, the burden of proof lies on the party so averring." Where, however, the subject of the alleged gift is held on a title *ex facie* absolute, the *onus probandi* will be upon the person denying donation and alleging trust (*Kirkpatrick*, 1864, 2 M. 1396; McLaren, *Wills*, ss. 1918 *et seq.*).

The course of judicial opinion has not been uniform in regard to the admissibility of parole evidence in rebutting this presumption (see Dickson, s. 158). But it is now settled that such proof is competent whether the gift alleged be *mortis causâ* (*Morris*, 1867, 5 M. 1036; *Wright's Exrs.*, 1880, 7 R. 527; *Crosbie's Trs.*, 1880, 7 R. 823; *Sharp*, 1883, 10 R. 1000) or *inter vivos* (*Wright's Exrs.* and *Sharp*, *ut supra*; *Milne*, 1884, 11 R. 887) in character. In either case, two requirements must be satisfied: the transaction must be free from suspicion, and the proof must be satisfactory (*Crosbie's Trs.* and *Sharp*, *ut supra*, per Ld. Deas: cf. *Ross*, 1871, 10 M. 197). It is plain, in regard to the first point, that the nature of the relations which subsisted between the parties is an element of great importance. Thus the fact that the person alleging donation kept the alleged donor apart from his friends and relations (*Sharp*, *ut supra*), or supplied him with excessive quantities of intoxicants (*Ross*, *ut supra*), will strengthen the presumption against donation. It is to be observed in this connection, that a donation to a person in a position of dominant or ascendant influence, by one subject to that influence, is regarded as granted in exercise of that influence, and, unless the presumption be overcome, the donation will be set aside (*Tennent*, 1868, 6 M. 840, 866, per Ld. Ardmillan; affd. 1870, 8 M. (H. L.) 10). This principle has received illustration in the case of parent and child (*Gray*, 1879, 7 R. 332), client and law agent (see *Gray*, *ut supra*, and cases there cited), spiritual adviser and penitent (*Munro*, 1874, 1 R. 522), and doctor and patient (*Kinn*, 1862, 24 D. 1088; *Munro*, *ut supra*; see Taylor, s. 151). On the other hand, the presumption against donation is much weaker where a receipt is taken in favour of a near relation or friend, with whom the alleged donor was on intimate and affectionate terms, than where it is taken in name of a clerk or man of business, or executor or trustee. In the second class of cases the inference is that the money is handed over, not as a gift, but for facility in administration, or for the purposes of the will, or for interim custody (*Bryce*, 1866, 4 M. 312; *Crosbie's Trs.*, 1880, 7 R. 823). As instances of the first class of cases, see *British Linen Co.*, 1849, 11 D. 1004; *McCubbin's Exrs.*, 1868, 40 Sc. Jur. 158; *Galloway*, 1884, 11 R. 541. As instances of the second class, see *Henderson*, 1839, 1 D. 927; *Heron*, 1851, 14 D. 25; *McNeill*, 1864, 2 M. 626; rev. 1866, 4 M. (H. L.) 20; *Ross*, 1871, 10 M. 197; *Thomson*, 1884, 11 R. 453; *Morrison*, 1890, 17 R. 958. See also *Harper*, 1850, 22 Sc. Jur. 577, and *Allan*, 1861, 23 D. 417). The fact that the alleged

donor had on a previous occasion employed a man of business to draw, and then to alter, his settlement, and that, on the occasion of the alleged gift, the services of such a person were procurable, but were not procured (*Ross and Sharp, ut supra*); or that he had made a settlement with which the alleged donation was inconsistent (*Henderson, ut supra*, as contrasted with *Gibson*, 1872, 10 M. 923. See also *McNicol*, 1889, 17 R. 25, and *Dewar or Milne*, 1880, 8 R. 83); or that the alleged donation embraced all, or nearly all, his means (*Ross, Sharp, and Galloway, ut supra*; *Dawson*, 1891, 19 R. 261)—is, in general, an element considered to be adverse to the establishment of donation. Of course, such elements may be deprived of importance by other facts in the case. For example, the proof may vindicate the *bona fides* of a transaction which, on the face of it, has the appearance of a simulate transfer (*McCourt*, 1893, 20 R. 488). Again, it is very improbable that a man will denude himself of all that he has; but the improbability is less striking when the man knows that he is ill of a malady from which he cannot recover (*McCourt, ut supra*).

In regard to the second point, it is to be observed that, in order to establish a gift *inter vivos*, the proof must be stronger than where a *donatio mortis causa* is in question; for in the latter case the gift is *sub modo*, while in the former it is an out and out donation (*Sharp*, 1883, 10 R. 1000, per Ld. Deas; cf. *Swan's Trs.*, 1867, 5 S. L. R. 674; *Grierson*, 1877, 15 S. L. R. 105. See DELIVERY OF DEEDS; DONATION MORTIS CAUSA). Accordingly, while delivery or its equivalent is essential to a gift *inter vivos* (*Crosbie's Trs., ut supra*, per Ld. Shand; *Thomson*, 1884, 11 R. 453, per Ld. Young; *Milne*, 1884, 11 R. 887, per Ld. Young; see *Galloway*, 1884, 11 R. 541), actual delivery is not always necessary to a donation *mortis causa* (see DONATION MORTIS CAUSA). In both cases it is of the first importance that the evidence of those who are called in support of the person alleging donation be unambiguous. For example, it will be of no value if it be consistent with the idea of transference for some purpose other than donation, *e.g.* administration (*Sharp, ut supra*). And its value will be greatly diminished if, as observed in the case last cited, “none of the witnesses adhere to any one form of words used by the deceased; they vary from one another in their accounts, nor do they adhere throughout to one particular form of expression, giving one version in their examination-in-chief, another in cross, and a different one sometimes in re-examination. Only a slight variation would make all the difference in the result of the evidence.” It is not necessary that the evidence of the person supporting the gift be absolutely uncontradicted as to all the facts of the case, provided that the counter-evidence does not render doubtful the truth of the proof of donation (*Macdonald*, 1889, 16 R. 758, per Ld. Justice-Clerk Macdonald). A large number of these questions have arisen in connection with deposit receipts (see DEPOSIT RECEIPTS); and, while it is settled that the terms of these documents cannot, taken by themselves, establish a transference of property, or constitute an operative destination (*Watt's Trs.*, 1869, 7 M. 930; *Durie*, 1871, 9 M. 969; *Miller*, 1874, 1 R. 1107; *Crosbie's Trs.*, 1880, 7 R. 823; *Jamieson*, 1880, 7 R. 1131; *Galloway*, 1884, 11 R. 541; *Blyth*, 1885, 12 R. 674 (the case of a bank-book); *Diarmuid's Err.*, 1895, 23 R. 234; see, however, *Connell's Trs.*, 1886, 13 R. 1175, per Ld. Shand; *Macdonald*, 1889, 16 R. 758, per Ld. Young), still they are very important as affording indications of intention (*Crosbie's Trs., ut supra*, per Ld. Pres. Inglis; see also *Durie, ut supra*; *Gibson*, 1872, 10 M. 923; *Thomson's Err.*, 1882, 9 R. 911; *Sharp, ut supra*; *Macdonald, ut supra*; *McNicol*, 1889, 17 R. 25). Thus, where the question is whether the testimony of the donee is, or is not,



sufficiently corroborated, it will be strongly in his favour if his story harmonise not only with the terms of the deposit receipts, but with what may be called their history,—if, that is to say, the statements attributed to the alleged donor are consistent with his dealings with his bankers (*Crosbie's Trs., ut supra; Thomson's Exr., ut supra*). Two cases are worthy of observation,—where the owner takes the receipt in the name of another person, and where, the receipt being in his own name, he endorses it to another person. In the former case, the possession has been changed, and the question *quo animo* alone remains for proof (*Gibson, ut supra; Buchanan, 1876, 3 R. 556; Thomson's Exr. and Sharp, ut supra*). But the latter case is not nearly so favourable for donation (*Sharp, ut supra*); for a deposit receipt is not a negotiable instrument; and the property in the sum which it represents cannot be transferred by mere endorsement and delivery, whether the endorsement be blank or special, and whether the words “or order” be added or not (*Morris, 1867, 5 M. 1036, per Ld. Ardmillan; cf. Barstow, 1857, 20 D. 230*). As to the effect of the endorsement of a bill in a question of donation, see *M'Neill, 1864, 2 M. 626; rev. 1866, 4 M. (H. L.) 20*; and of a cheque in a question of payment, see LOAN). Endorsation is “an ambiguous act” (*Sharp, 1883, 10 R. 1000, per Ld. Shand*); its purpose may be to make a donation, or it may be to facilitate administration (*vide supra*). Nor will mere delivery, without endorsement, of a deposit receipt by the creditor be sufficient to pass the right of credit. Something in writing equivalent to an assignation or procuratory, in favour of the party to whom the receipt is delivered, seems to be necessary (*M'Nicol, 1889, 17 R. 25*).

As to the effect of a destination in a disposition, stock certificate, policy of insurance, etc., in favour of a third person, see DELIVERY OF DEEDS (7).

As to the effect of a cheque in favour of a person alleging donation, cf. *Bryce, 1866, 4 M. 312, with Milne, 1884, 11 R. 887*; and see Williams' *Law of Executors*, 9th ed., i. 688.

Where, however, there exists a relation between the parties to the transaction such as to infer a natural obligation upon, one to provide for the other, as in the case of father and child (*Macdougall's Crs., 1804, M. App. “Bankrupt,” No. 21; White, 1841, 3 D. 468; Nisbet's Trs., 1868, 6 M. 567; Douglas, 1876, 4 R. 105; Malcolm, 1889, 17 R. 255; cf. Galt, 1830, 8 S. 332; Fairgrievies, 1885, 13 R. 98*), or uncle and nephew (*Wilson, 1826, 4 S. 817; Campbell, 1827, 5 S. 219*), there is room for the presumption that advances made have been made *ex pectate*,—that they are to be regarded as gifts rather than as debts (*Forbes, 1869, 8 M. 85, per Ld. Cowan*. See below as to the application of the presumption *debitor non presumitur donare*). As regards the former case, it is to be observed that advances made by a parent to a child are subject to collation, unless the parent has expressly or by clear implication declared his intention to the contrary (*Skinner, 1775, M. 8172; Nisbet's Trs. and Douglas, ut supra*). Further, this presumption has been held to apply in the case of payments made by a person in good circumstances on behalf of a minor brother during his apprenticeship (*Drummond, 1834, 12 S. 342; cf. Murray, 1843, 6 D. 176; Forbes, 1869, 8 M. 85*). In order to determine whether the presumption is or is not applicable, the whole facts and circumstances of the case under consideration must be taken into account. Thus, it has been regarded as an element in the proof that the person making the advances did enter them in his books (*Drummond, ut supra; cf. Black, 1835, 14 S. 113, and Fraser, 1839, 2 D. 144*), or did not enter them (*Campbell, Drummond, and Murray, ut supra*), or that he received interest upon them (*Farquhar's*

*Trs.*, 1841, 3 D. 658), or that he was a man of business habits, and neither mentioned them in making his testamentary dispositions, nor kept any voucher for them in his repositories (*Farquhar's Trs.*, *ut supra*), or that the advance was not at first regarded as a loan by the person making it (*Farquhar's Trs.*, *ut supra*), or by the person receiving it (*Murray*, *ut supra*), or that the person making it rendered an account in respect of it, or made a demand for payment (*Drummond and Murray*, *ut supra*).

"The maintaining at bed and board of one who is come of full age is in law accounted a donation, because it is presumed that he who affords the alimony, if he does not stipulate for himself that he shall have an allowance in name of board, makes him whom he maintains welcome to his house, either for the sake of his company or in consideration of the services he expects from him. But if he earns his bread by the entertainment of strangers, this stronger presumption entitles him to board, even without a previous paction" (Ersk. iii. 3. 92; see *Stair*, i. 8. 2; *Forrest*, 1715, M. 9713, 11098). Observe that in several of the cases the person furnishing aliment was not related to him who received it (*Wilson*, 1701, M. 11427; *Norval's* case, cited in *Campbell*, 1827, 5 S. 219; see also *Guthrie*, 1672, M. 10137; and Ersk., *ut supra*). If the person alimented be a minor, and if his father be alive, or if he have tutors or curators, the sums paid prior to demand cannot be recovered (*Ludquharn*, 1665, M. 11425; *Gordon*, 1680, M. 11426), unless the person alimenting be poor (*Wilson*, *ut supra*; *Steven*, 1791, M. 11458; cf. *Ker*, 1673, M. 11436). If his father or his tutors or curators be out of the country (Ersk., *ut supra*; *Chisholm*, 1703, M. 11428. The report of this case by Fountainhall, under date 15 Jan. 1703, M. 11427, is to the opposite effect), or if he be without tutors and curators, the sums paid will be recoverable, for there was no one with whom the person giving the aliment could contract for repayment (*Stair*, *ut supra*). It is otherwise where the facts of the case raise the presumption that the payments were made *ex pietate* (*vide supra*; *Guthrie*, *ut supra*; *Row*, 1676, M. 11436; *Gourlay*, 1697, M. 11438). Even then reimbursement may be claimed out of the income of the person alimented, when he has sufficient means of support (cf. *Guthrie*, *Row*, and *Gourlay*, *ut supra*, with *Fairgrieces*, 1885, 13 R. 98). If he succeed to such means, he is not rendered liable thereby to repay the alimony received prior to the date of his succession (*Lugton*, 1672, M. 11435; *Gourlay*, *ut supra*; *Home*, 1757, M. 412; *Wilson*, 1826, 4 S. 817). Where a person maintained his sister-in-law, who was possessed of ample funds, both during her minority and after she attained majority, it was held that, as he was entitled to repayment of what he had expended on her when minor, he was also entitled to the cost of her board after she came of age, although there was no bargain between them (*Spence*, 1681, M. 11437). In a very special case (*McGaus*, 1882, 10 R. 157), it was held that sums contributed by a sister to her brother's support were a debt against his estate. The fact that the brother and sister belonged to a humble rank of life, that they joined in setting up house, and that the brother regarded himself as his sister's debtor, were the chief considerations upon which the judgment rested. See ALIMENT.

"As a necessary consequence of the presumption against donation, there arises yet a stronger—*Debitor non presumitur donare*; for where a debtor gives money or goods, or grants bond to his creditor, the natural presumption is, that he means to get free from his obligation, and not to make a present, unless donation be expressed" (Ersk. iii. 3. 93; see *Stair*, i. 8. 2). In a recent case (*Johnstone*, 1896, 23 R. (H. L.) 6), *Ld. Herschell* observes that the maxim "is a maxim which embodies common sense; it

is only this, that a debtor is not presumed to make a gift. That is, of course, very far from implying that he may not perfectly well make a gift. I take it to mean this, and this only, that where a debtor makes a disposition of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of his obligation. But if there are circumstances which indicate that he did not intend it to be a mere discharge of his obligation, but intended to benefit the creditor and so make that person an object of his bounty, then it is just as effectual as though no such relationship existed between them. It comes then to be a question of fact to be determined in each case, whether there is enough to show that he did not intend the disposition to be in satisfaction of his obligation, but did intend it to be a gift." Such facts and circumstances as the following are, accordingly, worthy of consideration;—the footing on which the advances were made and taken, the kinship or intimacy of the persons making and receiving them, the history of their past relations, the means of each, the nature of the debtor's obligation, the form of the advance, the occasion on which it was made (see *Scott*, 1846, 8 D. 791, per Lord Justice-Clerk Hope), and, if made by deed, the narrative of the deed (*Dickson*, 1671, M. 11490; *Fenton*, 1673, M. 11491; *Abernethy*, 1676, M. 11492; *Orl*, 1685, M. 11492; see also *Balfour*, 1842, 4 D. 1044); and the fact that the person making the payments entered them in his books (*Scott*, *ut supra*), or did not enter them (*Black*, 1835, 14 S. 113; *Fraser*, 1839, 2 D. 144), or did, or did not, preserve vouchers for them (*Black* and *Scott*, *ut supra*; see also *Buchanan*, 1822, 1 S. 323; *affd.* 1824, 2 Sh. App. 445, and the cases cited above in reference to payments made *ex pietate*). It has been held that where a person, having in his hands funds belonging to another person, whom he is not under any natural obligation to maintain, makes advances to him or on his behalf, those advances may be recovered out of the income (*Gordon*, 1757, M. 11453; cf. *Moncreiff*, 1775, M. 11455; *Hunter*, 1831, 9 S. 703; 1832, 6 W. & S. 206; and see *Black* and *Fraser*, *ut supra*, and *Howden*, 1841, 3 D. 388. As to repayment out of capital, see ALIMENT). And the same principle has been applied where the person receiving the advance was a minor, to whom the person making it stood *in loco parentis* (*Winrahame*, 1668, M. 11433). The special circumstances of the case, however, may lead to an opposite conclusion (*Galt*, 1830, 8 S. 332. See *Fairgrievies*, 1885, 13 R. 98, per Ld. Pres. Inglis and Ld. Shand, where the former expressed an opinion that a father's obligation to maintain his children was so absolute as to preclude any claim by him for reimbursement. See ALIMENT).

It may now be regarded as settled that there is a presumption that testamentary provisions by a parent in favour of a child for whom he has undertaken by an antecedent contract to provide, are to be taken in satisfaction of the contractual provision (*Kippen*, 1858, 3 Macq. 203, per Ld. Chelmsford, Ch.). In a recent case (*Johnstone*, 1896, 23 R. (H. L.) 6), the legatee was not a child of the testator. The presumption may be displaced by evidence of contrary intention. Observe, that in ascertaining intention, the only materials which may be legitimately referred to are the terms of the deeds containing the provisions (*Johnstone*, *ut supra*, per Ld. Watson. See PAROLE). It is a circumstance adverse to the presumption that the provisions are dissimilar (*Clark*, 1823, 2 S. 313; *Dundas*, 1827, 5 S. 790; *Smith*, 1841, 3 D. 1109; *Elliot*, 1873, 11 M. 735; cf. *Cowan*, 1873, 1 R. 119; *Kippen*, 1874, 1 R. 1171; *Hope Johnstone*, 1880, 7 R. 766), or

that the testator describes the second provision as a legacy (*Johnstone, ut supra*, per Ld. Shand; see also *Smith, ut supra*, and *Balfour*, 1842, 4 D. 1044).

The presumption holds also in the case of a bequest by a debtor to his creditor; but it is displaced whenever the facts show that the intention was not to pay a debt, but to make a gift (*Balfour*, 1842, 4 D. 1044). In the case last cited, Lord Justice-Clerk Hope observed that no weight was to be attached to the circumstances that the deed conferring the legacy contained a general direction to pay debts (see Ld. Monereiff's opinion in that case), and that trifling differences as to the term of payment were of no great importance (cf. also *Spaden's Trs.*, 1822, 1 Sh. App. 164). Where the ultimate destination of the legacy is to persons other than those entitled to payment of the debt, there is, in general, no room for the presumption (*Balfour, ut supra*): nor will it apply where the legacy is given subject to a condition (*Hunter*, 1836, 15 S. 159), or where it is not of the same nature as the debt (*Macdowall*, 1833, 11 S. 952).

Where, under a family arrangement, a brother gave his sister heritable security for payment of a sum of money on their mother's death, and before that event granted a holograph absolute obligation to his sister to convey part of the subjects constituting the security, it was held that the presumption was not sufficient to control the terms of the written obligation. It was observed that the two obligations did not quadrate: that the one did not refer to the other; and that the terms of the one did not naturally connect with the other (*Ritchie*, 1858, 20 D. 1093).

In the opinion of Ld. McLaren, this presumption has no application to cases where "a settlor or testator, after making a testamentary provision in favour of a child or legatee, makes advances to the same individual in the shape of pecuniary payments during his lifetime; . . . for even in the case of an onerous provision, *e.g.* an obligation undertaken in a marriage contract, the father is not a debtor to the child at the time of making the advance, the obligation being in the case supposed only prestable at his death, and payable out of his free estate" (McLaren, *Wills*, s. 1372; see *Scott*, 1846, 8 D. 791). He states, as the result of the authorities, that there is no positive presumption that such advances are designed as a satisfaction of the testamentary provision, but that slight evidence of such an intention on the part of the father will be sufficient to raise a presumption (*ib.* s. 1376. See *Robertson*, 1838, 16 S. 554; *Webster*, 1859, 21 D. 915; and cf. *Greenock Banking Co.*, 1844, 6 D. 1340). The presumption against donation applies where the advances are made by a person not standing *in loco parentis* to the person receiving them (*Buchanan*, 1822, 1 S. 323; *affd.* 1824, 2 Sh. App. 445).

As to the presumptions in regard to donation *inter virum et uxorem*, see DONATION INTER VIRUM ET UXOREM.

[*Dickson, Evidence*, ss. 158-172; *Kirkpatrick, Digest*, s. 159; McLaren, *Wills*, ss. 786, 790, 1338-1378.] See LEGACY.

**Doom.**—In our early law this word signified a judicial sentence, whether pronounced in a civil or criminal cause. At an early period appeals to higher Courts from justiciars and judges ordinary were styled falsing of dooms. This mode of appeal continued from the reign of James I. to that of James IV. By the Act 1503, c. 95, the falsing of dooms of the sheriffs or bailies were directed to be brought before the justiciar, and those of the justiciar before a committee of thirty or forty persons appointed by the king;

"and if the appeal be from the bailies within burgh, the party shall come to the chamberlain, who shall set a Court of the four burrows upon fifteen days, and make the said doom to be discussed; and where there is an appeal from a freeholder to any immediate superior of that Court appealed from, he shall set his Court upon fifteen days, and make the said doom to be discussed. And if it be falsed in the said Court of four burrows or in the Sheriff Court, to have sicklike process to the Court immediately superior." Stair points out (ii. 3. 63; iv. 1. 31) that all appeals or falsing of dooms ceased on the institution of the College of Justice in 1532; and that "the Senators of the College of Justice had the same power and authority that the Lords of the Session and Daily Council had before; and so their final sentences were ultimate, without appeal to King or Parliament" (iv. 1. 55).

Prior to 1773, when a capital conviction was reached in the Court of Justiciary, the doom or sentence was pronounced by the public headsman or doomster. This custom was abolished by the Act of Adjournal of 16 March 1773, and it was enacted that in future the sentence should be pronounced by the presiding judge.—[Hume, ii. 3. 472; Ersk. iv. 2. 39; Mackay, *Practice*, i. 38.]

### **Doors, Chalking of.**—See CHALKING OF DOORS.

**Doors, Closed.**—In Scotland the statutory rule is that *a criminal trial* is conducted with open doors: and it is illegal to exclude the public from the Court-room (1693, c. 27). But in the case of trials for indecent and unnatural offences, the public may be excluded and the case tried "with closed doors" (*ib.*; Alison, ii. 375); in which case the doors ought to be opened before the jury return their verdict (Macdonald, *Crim. Law*, 426). It is the practice not to admit the public until that stage, but the terms of the Act exclude them only "at the leading of the probation." When a case is tried with closed doors, "all persons except parties and their procurators" may be removed (1693, c. 27). The Court may also be cleared on account of disorderly conduct on the part of the public, or on account of intimidation (*Finnie*, 1850, J. Shaw, 368; *Orr*, 1855, 2 Irv. 183; Macdonald, 426).

In *civil actions*, although a judge has no statutory authority to hear a case *in camera*, it is permissible for him, in exceptional circumstances, to order the doors to be closed if, in his opinion, secrecy is desirable in the interests of public morality.

### **Doors, Letters of Open.**—See OPEN DOORS.

**Dos.**—The *dos*, in Roman law, was property made over to the husband as a contribution on the part of the wife towards the expenses of the marriage state. That portion of a married woman's property which was not included in the *dos* was known as *parapherna*: of this she remained proprietor, and the husband had no control over it. A woman had a legal right to demand that certain persons—her father and paternal ascendants, and, in special circumstances, her mother—should provide a *dos* for her. A *dos* provided by a person in pursuance of a legal obligation to do so was termed *dos profecticia*. A *dos* supplied by any other person was *dos*

*adventicia*. A *dos* provided by a third party, on the express condition that it should be restored to him on the dissolution of the marriage, was *dos recepticia*.

During the subsistence of the marriage the husband was the owner of the *dos*. He had the sole management of it, and could dispose as he liked of the *fructus* derived from it. In the later law, however, he was prohibited from mortgaging or alienating immoveable property comprised in the *dos* (*fundus dotalis*); and not even the wife's consent could make such a sale or mortgage valid. In various other ways the law intervened to protect the wife's interest in the dotal estate.

Under Justinian the husband was, as a rule, bound to return the *dos* on the dissolution of the marriage. He had a right to keep it, indeed, only in the case where the dissolution of the marriage was brought about by the misconduct of the wife. A wife's right to recover the *dos* was secured by a privileged hypothec over the whole estate of her husband. Immoveable property belonging to the *dos* must be restored immediately on the dissolution of the marriage; moveable property, in a year. The husband, however, was entitled to retain *propter impensas necessarias*, i.e. in respect of outlays necessarily incurred for the preservation of the dotal property (*Dig. 23. 3: Cod. 5. 12: Ulpian Frag. vi. De dotibus*).

**Double Distress.**—Where diligence is used or threatened against a debtor at the suit of two or more different competitors all claiming right to the same debt or subject, what is known as double distress arises, and the debtor has the right to raise an action of double, or multiple, pinding, in which all the different claimants are called to dispute their claims. The procedure in multiplepindings, including the right of one of the competitors to raise the action in the name of the debtor, is detailed in the article MULTIPLEPINDING and the only question to be discussed now is what constitutes "double distress." From the many cases reported on the subject, it may be taken that the tendency of modern decisions has been to allow greater laxity as to what constitutes double distress, and to give the holder of a fund, against which more than one claim is made, the benefit of this form of action, which relieves him of all responsibility when the competitors have been properly brought into Court. The original idea, that actual double diligence must have been done, has long been superseded, and double distress is held to exist wherever there is a "double claim to one fund on separate and hostile grounds" (*Russel*, 1859, 21 D. 886).

A distinction has been drawn between a multiplepinding raised by the holder of a fund and one raised by one of the competitors in name of the holder, and the practice of the Court on the point has been shortly stated in a recent case. "We allow an action of multiplepinding to be brought by a competing party in name of the neutral person, but that is never allowed except when there is double distress in the strict and proper sense of the term. If a person thinks himself entitled to some property, which is in possession of another, his course is to raise a direct action. He is not entitled to raise a multiplepinding on the mere report that someone else is claiming the fund. When there are double actions or double diligence, then the only way to extricate the matter is by a multiplepinding. The practice of our Courts, however, warrants a much greater latitude in the case of the holder of a fund than in the case of the competitors, and for the reason that the holder of the fund can never raise

a direct action, and is not bound to remain a depositary till the day of his death, or till the disputing parties agree to settle their claims. He is entitled to be relieved, by means of an action of multiplepoinding, after a reasonable time, and accordingly it is a sufficient justification of the institution of the action, and is the criterion of its competency, that the claims intimated make it impossible for the depositary to pay to one of the parties without running the risk of an action at the instance of the other" (*Winchester*, 1890, 17 R. 1046, per *Ld. McLaren*).

There are many cases of multiplepoindings raised by a competitor which have been dismissed on the ground that there was really no double distress, and the proper course was a direct action for payment, or an action of accounting or furthcoming, or a suspension. Thus a son claiming legitim raised a multiplepoinding in name of his father's executors. The action was dismissed as incompetent (*Crokat*, 1853, 15 D. 737). One of many creditors of a deceased insolvent raised a multiplepoinding in name of the deceased's trustees. Most of the other creditors had acceded to a private trust for winding up the estate. The action was dismissed (*Crichton*, 1836, 14 S. 629). In another case A. paid to B.'s agent a sum of money which he owed to B., and then raised an action of reduction against B., and arrested on the dependence. He then raised a multiplepoinding in the agent's name. The action was dismissed, as A.'s proper course was to bring a furthcoming if he succeeded in his action against B. (*Stewart*, 1828, 7 S. 145). A., who disputed a claim made against him by B., deposited a sum of money in the hands of C. to meet B.'s claim, if made good. B. raised a multiplepoinding in C.'s name, which was held incompetent, there being no double distress (*Clark*, 1873, 1 R. 281). Beneficiaries under a trust alleged that the trustees were paying creditors who had not a good claim. The beneficiaries raised a multiplepoinding in name of the trustees. The action was dismissed (*Robb*, 1880, 7 R. 1049); as was also an action on similar grounds raised by a non-acceding creditor in name of the trustee under a voluntary trust (*Kyd*, 1880, 7 R. 884). A sum of money was left to a truster's widow, to be divided among her relations as she should think fit; it was paid into bank in her name. Certain of the relations raised actions against her and arrested the funds in bank. They then brought a multiplepoinding in name of the bank. The action was dismissed, on the ground that there was no double distress (*Bank of Scotland*, 1871, 8 S. L. R. 419).

On the other hand, many actions raised by competitors in name of the holder of the fund have been held competent. Creditors of S. arrested in hands of railway company goods belonging to S. but addressed to R. R. claimed the goods as his own, and produced a receipt from S. for the price of the goods. The multiplepoinding raised in name of the railway company was objected to by R., on the ground that there was no double distress till the receipt was reduced; but the objection was repelled (*North British Railway Co.*, 1881, 9 R. 97). An action had been raised against an executor by a creditor of the deceased. This creditor's claim, which would have swallowed up the whole estate, was objected to by other creditors, one of whom, with the consent of the executor, raised a multiplepoinding in his name. The action was held competent (*Jamieson*, 1888, 16 R. 15). A multiplepoinding, raised in name of a factor *loco absentis* by a person who alleged that he had right to the estate of the absentee, was held competent as a form of process to try the question whether and when the absentee had died (*Tail's Factor*, 1890, 17 R. 1182). An incoming tenant agreed to reap an outgoing tenant's crop, and to pay its value to the landlord. A creditor of the outgoing tenant arrested in the hands of the incoming

tenant. A multiplepoinding raised by the landlord was held competent (*Park*, 1874, 2 R. 118). A fund was subscribed for certain congregational purposes. It was deposited in bank. Two parties in the congregation claimed it, and a multiplepoinding raised by a competitor was held competent (*Connell*, 1857, 19 D. 482).

Although the Court is more willing to allow the holders of the fund to use this form of process, yet there have been many cases in which multiplepoindings brought by them have been dismissed as incompetent. A discharge was offered to debtors under a bond and disposition in security. The debtors, on the ground that the claimants were not *in titulo* to grant a valid discharge, raised a multiplepoinding; the action was thrown out as incompetent because there was no double distress (*Monereiff*, 1844, 6 D. 1100). So also in another case, where a trustee, in doubt whether a legacy should be paid to a legatee's assignee, who claimed it, or to his trustee in bankruptcy, who did not claim it, raised a multiplepoinding, the action was dismissed on the same ground (*Connell's Trustee*, 1878, 5 R. 735). The executor of a deceased claimed payment of a debt. The debtor raised a multiplepoinding, calling both the executor and the heir of the deceased as the defenders. The heir had made no claim, and the action was dismissed (*Great North of Scotland Railway*, 1863, 1 M. 1053). In a charter party it was stipulated that freight should be paid by a third party, A., on production of certain certificates. The freighters put money into A.'s hands to meet the claim for freight. The owners claimed freight, but the freighters instructed A. not to pay, as they had counter-claims against the owners. A multiplepoinding raised by A. was held incompetent, there being no double distress (*Dennistoun*, 1853, 16 D. 154). A landlord called upon his tenant to pay rent due to him, and a tax-collector demanded from the tenant payment of an assessment due by the landlord. The latter did not dispute that the assessment was due and might be deducted from the rent. A multiplepoinding brought by the tenant was dismissed (*Logan*, 1855, 17 D. 485). A. obtained a decree for a sum of money against B. C., a creditor of A., arrested in B.'s hands, and B. raised a multiplepoinding. The action was dismissed, on the ground that there was no double distress, although other arrestments had been used after the action was raised (*Mitchell*, 1869, 8 M. 154; *commented on* 12 R. 404). A claim was made against a trust estate. Some of the beneficiaries did not admit it, and the trustees raised a multiplepoinding for their exoneration. The action was dismissed, on the ground that there was no double distress, and expenses were given against the trustees as individuals (*Mackenzie's Trs.*, 1895, 22 R. 233).

On the other hand, it has frequently been held that the holder of a fund is entitled to bring a multiplepoinding even where one of the claims is obviously ill-founded, as the holder of the fund is not bound to take the risk of paying one applicant even if he thinks the other has not a good claim. He is entitled to the benefit of a decree ordaining him to pay. Thus in one case A. was found entitled to expenses in an action against him by B. A.'s creditors arrested in B.'s hands and brought a furthcoming. When the account of expenses was taxed, A.'s law agents took decree in their own name as agents-disbursers, and charged B. for payment. B. raised a multiplepoinding, which was held competent: but it was observed that when the competition was decided, the unsuccessful claimant might have to pay the whole expenses of process (*Pollard*, 1881, 9 R. 21). A.'s law agent obtained from him a bill in his favour. A. became bankrupt, and his trustee, and also a creditor, who had used arrestments,



claimed the bill. A multiplepointing raised by the agents was held competent (*Dill, Wilson, & Muirhead*, 1884, 12 R. 404). A multiplepointing was held competent which was raised by a bank as to a deposit receipt belonging to a deceased person. It was claimed by his granddaughter, on the ground that she had received it as a donation. The sons of the deceased had intimated that they objected to the bank paying the deposit receipt to the granddaughter (*Royal Bank of Scotland*, 1893, 20 R. 290). An action was raised by certain trustees against an executrix for payment of a sum of money which had vested in and been assigned by A. to them. A. wrote to the executrix that she claimed payment of the sum to herself personally. The executrix raised a multiplepointing, which was held competent; but it was observed that it was not sufficient for the holder of a fund to say, "A claim has been made," without saying that some ground has been alleged on which the claim is based (*Fraser's Executrix*, 1893, 20 R. 374).

One of several competing claimants for one half of a trust estate raised a multiplepointing, but made the whole estate the fund *in medio*. The action was dismissed as incompetent, on the ground that there was no double distress except as to one half of the fund *in medio* (*McNab*, 1894, 21 R. 827).

Multiplepointings are often raised by trustees for their exoneration and to decide questions of vesting, or points as to the construction of the deeds under which they act. In these cases trustees do not require to allege actual double distress.

[*Stair*, iv. 16. 3; *Ersk.* iv. 3. 23; *Bankt.* iv. 24. 32; *Bell, Com.* ii. 276; *Shand, Practice*, p. 581; *Mackay, Manual*, 387.]

See MULTIPLEPOINTING.

**Double Ranking in Bankruptcy.**—Where a principal and cautioner are bound for a debt, and the principal becomes bankrupt, there can be only one claim in respect of the debt against the bankrupt estate. Thus, where the creditor ranks on the estate for his whole debt, and obtains a dividend, and thereafter recovers payment of the balance from the cautioner, the latter cannot claim to rank on the principal's estate in relief of the sum so paid by him. This is not to deny the cautioner his right of relief. The ranking and dividend obtained by the creditor enure to the cautioner's benefit, by reducing the amount which he can be called on to pay, and the cautioner is placed in exactly the same position as if he had paid up the full debt to the creditor, and then ranked for relief on the principal debtor's estate. To allow the cautioner as well as the creditor to rank, would involve a double ranking for the same debt, and the payment twice over of the dividend effecting to the portion of the debt paid by the cautioner. So far as the bankrupt estate is concerned, the payment of dividend on a debt is payment of the debt itself (*McMillan*, 1879, 6 R. 601; *MacKinnon*, 1881, 9 R. 393; *Bell, Com.* ii. 420). Thus, in the case of a bill drawn or accepted for accommodation, if both parties become bankrupt and the holder ranks on the estate of each for the amount in the bill and receives dividends, the trustee on the estate of the accommodation party or cautioner is not entitled to claim against the estate of the principal debtor in relief of the dividends which the former estate has paid to the holder (*Anderson*, 1876, 3 R. 608). Where, in such circumstances, the cautioner has in his hands funds belonging to the principal debtor, but which have not been specifically appropriated for his indemnification on the bill, the trustee

on the cautioner's estate is, on the same principle, debarred from claiming a right of retention over these funds, in relief of the dividends paid from the cautioner's estate (*Anderson, supra*; *MacKinnon, supra*). To allow such retention would be to enable the cautioner's estate to obtain payment of a debt which the principal debtor's estate has *ex hypothesi* already paid in the form of the dividend drawn on the whole debt by the bill-holder. It is otherwise where the cautioner holds securities specifically appropriated for his relief. In this case, the cautioner's trustee is entitled, in implement of the contract under which the securities have been given, to realise them and recoup his estate for the dividends paid by it to the bill-holder (*Royal Bank*, 1881, 8 R. 805, and 9 R. (H. L.) 67). Where the securities are insufficient to cover the whole debt, and the cautioner is solvent, the result to the cautioner and the bankrupt estate of the principal debtor will obviously vary, according as the creditor either (1) ranks for the full debt on the principal's estate in the first instance, and recovers the balance beyond his dividend from the cautioner, or (2) recovers the full debt in the first instance from the cautioner, leaving him to rank on the principal's estate for the amount so paid, under deduction of the securities held by him. By way of illustration, let it be supposed that the debt is £1000, the dividend paid by the principal debtor's estate 5s. per £1, and the value of the securities held by the cautioner, £500. In the *first* case, the creditor draws £250 in dividend from the principal debtor's estate and recovers the balance of £750 from the cautioner, who obtains reimbursement of £500 from the securities, and is left £250 out of pocket. In the *second* case, the cautioner pays £1000 to the creditor, ranks on the principal debtor's estate for £500 (being £1000, under deduction of the securities), and, drawing a dividend of £125, is left £375 out of pocket. It has been decided in one Scotch case that, as it is the right of the creditor to take which course he pleases, the trustee on the principal debtor's estate is not entitled, in the event of the creditor taking the first course, to insist on reckoning with the cautioner on the same footing as if the creditor had chosen to adopt the second course (*Jamieson* 1875, 2 R. 701; cf. *Christie*, 1838, 16 S. 1224, per Ld. Mackenzie). The rule in England seems to be to the contrary, at least where the creditor claims on the principal debtor's estate by an arrangement with the cautioner with a view to the latter's advantage (*Baines*, 15 Q. B. D. 102, 16 Q. B. D. 330; *ex parte Sherrington*, 1 M. D. & D. 195).

The rule against double ranking only applies where there is a proper bankruptcy, involving divestiture of the debtor and the handing over of his estate for distribution among his creditors. Thus, where two firms, A. and B., had granted cross bills for value, and A. was sequestrated and B. entered into a private composition contract, and the holders of both sets of bills had drawn dividend from A.'s estate and received composition from B., it was held that a claim by B. against A. for an admitted debt could be met by A.'s trustee pleading retention of the dividend upon the claim to the extent to which A.'s estate had paid dividends to the bill-holders on B.'s acceptances. On the other hand, it was not disputed that the rule against double ranking operated to exclude any claim by B. against A.'s estate for the amount of composition paid by B. on those of the bills under which A. was the true debtor (*MacKinnon*, 1881, 9 R. 393).

[Bell, *Com.* ii. 420; Goudy on *Bankruptcy*, 591.]

**Double Title.**—Two distinct titles to the same property may exist in one individual, and he may ascribe his possession to either, as he

pleases. The fact that he has expressly attributed his possession to the one will not preclude him from founding, if necessary, upon the other; for possession is available to preserve to him, as against third parties, any right existing in his own person (*Id. Advocate v. Balfour*, 1860, 23 D. 147, per *Ld. Deas*, 155). Upon his death, however, difficulties may arise as to which of the titles that co-existed in him is to regulate the succession to the property, and hence the doctrine of prescription upon Double Title which was for many years the subject of animated controversy, but the leading principles of which have long been well established.

1. *Where there is Adversity of Interest between the two Titles.*—Where one who is at once heir under an entail and under a fee-simple destination neglects the former, and makes up a title under the latter, his possession thereon for the prescriptive period (formerly forty, now twenty years, under the Conveyancing Act, 1874, 37 & 38 Vict. c. 94, s. 34) will extinguish the limited title, and the property will pass either to the person called under the fee-simple destination or to the person called under any new destination made by the proprietor in whose person both titles existed. This rule is illustrated by a long series of cases, the most important of which are: *Innes*, 1695, M. 11212; *Macdougall*, 1739, M. 10947; *Douglas*, 1753, M. 10955; *Ayton*, 1756, M. 10956; *Duke of Hamilton*, 1827, 6 S. 44; *Hope Vere*, 1828, 6 S. 517; and *Macdonald*, 1842, 5 D. 372. It involves the application both of the positive and negative PRESCRIPTION (*q.v.*), that is to say, of both parts of the Act 1617, c. 12. On the one hand, there is possession upon a habile title, which after the lapse of the prescriptive period is unassailable by persons claiming under any other title whatsoever. On the other hand, there is the express denial for forty years of the obligation to make up a title under the limited deed, an obligation which might have been enforced at any time during that period, but which, not having been so enforced, becomes extinct (see *Cunningham's Trustees*, 1852, 14 D. 1065, per *L. J. C. Hope*, p. 1076, *Ersk. Inst.* iii. 7. 6). It is obvious that since the Conveyancing Act, 1874, the period of possession required to establish the positive prescription may have run, while that required to establish the negative prescription may be no more than half finished. No case involving the difficulty suggested by such a state of matters seems as yet to have arisen, but it is thought on principle that there would be no good answer to the demand of a substitute under a tailzied destination that the heir in possession who has made up a title under a fee-simple destination should make up a title under the former.

Three points deserve notice in the decisions on the case under consideration. (1) Here alone is *valentia agendi* on the part of someone possessing an adverse interest necessary to bring the positive prescription into play. Possession upon the limited title will accordingly not extinguish the unlimited title, for there is no right conferred on anyone by the latter capable of being enforced (*Reay*, 1823, 2 S. 457; 1825, 1 W. & S. 306). (2) To found a plea of prescription, a feudalised title is absolutely necessary (*Welsh Maxwell*, 1808, M.  *voce* "Preser." App. 8; *Lumsdaine*, 13 June 1811, F. C.). "Let the father be infeft in fee simple, and then suppose that he makes a personal deed of entail to a different series of heirs, fenced with irritant and resolute clauses, his eldest son being the first member of tailzie: in that case, if the eldest son enters into possession without making up a title, he could not found on his father's fee-simple title and his own possession to cut off the personal deed of entail. To do this effectually he must have a title in his own person, or at least there must be a title adverse to or independent of his father's title, to which he can ascribe his possession . . .

If he has an infeftment in fee simple independent of his father's, and forty years' possession, he has all that the Statute 1617 requires. On the other hand, if he wants that independent title, it will not avail him though he should ascribe his possession by the most unequivocal acts to his fee-simple infeftment, in contradistinction to the personal deed of entail . . . The personal deed which qualifies his father's title is the *lex feudi*, until prescription has run on a different title from that infeftment" (*Maule*, 1829 (per Ld. Corhouse), 7 S. 527 and App. 41). (3) The right claimed to be established by possession must be consistent with and not contradictory of the title to which that possession is attributed (*Dalyell*, 17 Jan. 1810, F. C.; *Cunningham's Trustees*, *ut supra*; *Porterfield*, 1821, 1 S. 5; 1829, 8 S. 16; 1831, 5 W. & S. 515).

2. *Where there is no Adversity of Interest between the two Titles.*—Where one who is heir under the last investiture and has at the same time a personal title to the lands makes up his title under the old investiture, both titles being unlimited, the personal title continues to qualify the proprietor's right and to regulate the succession, no matter for how long possession may have taken place on the other (*Gray*, 1752, M. 10803; *Durham*, 1802, M. 11220; *affd.* 1811, 5 Pat. 482; *Snodgrass*, 16 Dec. 1806, F. C.; *Zuille*, 4 March 1813, F. C.; *Ogilvy*, 1837, 15 S. 1027). The principle at the root of this is, that there is no vested right in anyone to call upon the possessor to make up a title under the personal disposition, whereas under an entail a right does exist in the heirs called to the succession to enforce the limitations contained in the deed. On the other hand, where, in circumstances similar to those just figured, a person after making up titles under the old investiture proceeds to execute a new conveyance of the lands containing a destination different from that in the personal title, the personal title will be extinguished, and the destination in the new conveyance will thenceforth be the *lex feudi* (*Edgar*, 1736, M. 3089, 2 Ross, L. C. 596, known as the *Elsieshiells* case; *Harvie*, 12 Dec. 1811, F. C.; *Molle*, 13 Dec. 1811; *affd.* 19 June 1816, 6 Pat. 160). The mere fact that a possessor has served himself heir to the person last vested in the fee instead of completing a title under the personal disposition, will not of itself imply an alteration in the destination, though the resignation of the lands into the hands of the superior and the taking of a new charter with a different destination will effectually wipe out that in the personal disposition (*Molle*, *ut supra*).

Possession being an indispensable element of prescription, it is important to be able to determine to which of two titles existing in the same person possession is to be ascribed. Where this is doubtful and no choice has been unmistakably indicated, Mr. Bell has laid it down, that if one title be more beneficial than another, possession is to be ascribed to the more beneficial (*i.e.* the less limited) title (Bell, *Prin.* s. 2020). This proposition, though vigorously combated in *Maule*, *ut supra*, and *Hunter*, 1829, Napier (274) has, to support it, the authority of Ld. Pres. Blair in *Oliphant Murray*, 17 Jan. 1811, F. C., and of Ld. Cuninghame in *Dalrymple* 1841, 3 D. 837; and has been definitely and expressly affirmed in *E. of Glasgow*, 1887, 14 R. 419.

[*Authorities.*—Ersk. *Inst.* iii. 7. 6; Bell, *Prin.* ss. 2019, 2020; Moir, *apud* Ersk. *Prin.*, 17th ed., p. 475; Napier on *Prescription*, pp. 199–229; Millar on *Prescription*, pp. 47–60; Rankine on *Landownership*, 3rd. ed., p. 59.]

See also CONSOLIDATION; ENTAIL; PRESCRIPTION.

**Double Securities.**—See CATHOLIC AND SECONDARY CREDITORS.

**Doubles of Summonses** are the copies served upon the defender or defenders at citation. The address and the will are frequently abbreviated, and short copies are permitted in summonses of mails and duties, exhibition *ad deliberandum*, choosing curators, transumpt, wakening, multiplepointing, furthercoming, adjudication, ranking and sale, and pointing of the ground (A. S. 15 Nov. 1723; 1 Jan. 1726; and 19 Feb. 1742). In other cases a full copy should be served.—[See Mackay, *Practice*, i. 395; *Manual*, 197; Beveridge, *Practice*, i. 239; Shand, *Practice*, i. 231.]

**Dovecot.**—The Act 1617, c. 19, declares that “no person . . . shall have power . . . to build a dovecot except that person have lands and teinds pertaining to him extending in yearly rent to ten chalders victual next adjacent to the said dovecot, at the least lying within two miles of the same . . . and that it shall in nowise be lawful to the person foresaid . . . to build more dovecotes upon and within the bounds foresaid except one dovecot only.”

This Act is not applicable to dovecotes built previous to 1617, and the presumption is that the dovecot was built before the date of the Act unless the contrary be proved. See Stair, bk. ii. tit. 3, s. 78; Bankt. bk. ii. tit. 3, s. 167; and Bell, *Prin.* s. 975.

A purchaser of lands with dovecot is not obliged to demolish the dovecot even though he have not the necessary qualification. In the early case of *Durie* (1682, Mor. 3601), however, the defender, who was in the position of a purchaser of lands and a dovecot without the statutory qualification, was ordained to “build up the head of the dovecot in order that the doves may not enter.” In the case of *Kinloch* (1731, Mor. 3601) this principle was reversed, and such a purchaser was allowed to retain the privilege of dovecot; but it was there decided that if the dovecot be ruinous, the purchaser was not entitled to rebuild.

It is further decided (*Brodie*, Mor. 3602) that a proprietor is at liberty to erect a dovecot for every ten chalders of yearly rent of which he is possessed (Ersk. ii. 6. 7; Ross, *Lect.* ii. 173), provided that the limit of two miles is preserved.

The Acts of 1567, c. 16, and 1597, c. 27, prescribe penalties for the slayers of pigeons; while the breakers of dovecotes are dealt with in the Acts 1474, c. 61, and 1579, c. 84, power being given to justices to deal with such matters by 1661, c. 38.

The taking of tame pigeons from a dovecot feloniously is declared to be theft; and the slaying of pigeons even when out of their dovecot is unlawful, no matter at what distance from its home a pigeon is destroyed. The most recent case bearing on the destruction of pigeons is that of *Easton* (1832, 5 Deas & And. 285), in which Ld. Balgray gave the leading opinion. The Court held there that it was illegal for a tenant to shoot pigeons which belonged to his landlord, who had a dovecot in the immediate neighbourhood, although the pigeons were destroying the tenant's seed and the landlord had refused to herd them. In giving his opinion Ld. Balgray corrects Bankt. 2. 3. 167, with regard to the legality of shooting pigeons. See also *Murray* (Mor. 7608), 1797.

Hume, at 1. 80, enumerates the Statutes under which the breakers of dovecotes and the destroyers of pigeons are punishable.

**Dowager.**—In England, a widow who is in the enjoyment of her dowry rights out of her late husband's estate (Tomlins, *h.t.*). The word is

commonly used without reference to dower, and merely to distinguish the widow of the father from the wife of the eldest son, when otherwise both ladies would have the same title. The word is generally restricted to widows of the holders of dignities.

**Draft (Banker's Draft).**—The form usually adopted for such drafts is as follows:—

[.....Bank.]                      [Place and Date.]

£.....

On demand pay to.....  
or order.....

[Signature of Issuing Banker.]

To.....  
(Banker upon whom drawn.)

It will thus be seen that banker's drafts are in form issued as bills payable on demand, and although they are drawn, as is almost universally the case, by one branch of a bank upon another branch of the same bank, or upon a correspondent of the issuing bank in favour of a named payee, yet the law applicable to bills of exchange and cheques applies to such documents. See *BILLS OF EXCHANGE*, s. 60: *CHEQUES*, *Forged Endorsations*.

**Draft.**—See *WILL*.

**Drainage.**—Inferior ground must receive the natural drainage of the upper ground, but is not bound to submit to what is produced by artificial changes on the condition of the water (Bell, *Prin.* s. 968). Inferior ground must receive the superfluous water of superior ground, even under the operations of draining, in all the variations of agricultural improvement (*Campbell*, 1864, 3 M. 254). If the right is unduly pressed by the superior proprietor, the Court will exercise an equitable jurisdiction to restrain him (Ersk. 2. 9. s. 2; Bankt. 2. 7. 30; Rankine on *Landownership*, p. 447). Unusual means of getting rid of drainage must not be used. A manufacturing establishment must not throw out an excessive quantity of water (*Durham*, 1871, 9 M. 474; *Miller*, 1792, Bell's *Ca.* 334; *Russel*, 1791, M. 12823; Bell's *Ca.* 344, 3 Pat. 403; *Hope*, 1779, M. 14583, 2 Pat. 286, 338, 520). An inferior proprietor is not entitled by artificial means to throw back the drainage on the superior proprietor (Rankine on *Landownership*, p. 448). The general rule as to drainage from superior to inferior ground applies to mines (*Aitken*, 1734, Elch. Property 3 (2 Ill. 119). The lower proprietor is bound to protect himself from the drainage of the superior proprietor (*Durham*, 1871, 9 M. 474; *Baird*, 24 D. 1418). Drainage may be sent into natural streams and rivers (*Downie*, 1825, 4 S. 167, 2 Ill. 120; but see *Montgomery*, 1853, 15 D. 853; *Campbell*, 1864, 3 M. 254); but not into an artificial mill lade (*Eyre*, 1827, 5 S. 912). The Legislature has made provision for advancing money for the purpose of drainage (9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9; 27 & 28 Vict. c. 114). In an entailed estate a proprietor laying out money for draining is a creditor of succeeding heirs for three-fourths of the sum laid out, provided the sum laid out does not exceed four years' rent (10 Geo. III. c. 51, ss. 9 and 10 (*Montgomery Act*). For a

definition of drainage as applied to an entailed estate, see the Entail Amendment Act (38 & 39 Vict. c. 61), s. 3.

*Outfalls.*—10 & 11 Vict. c. 113, provides that “where any land shall be capable of being drained, or improved by drainage, by means of works to be executed on the same and other lands for obtaining or improving the outfall, or otherwise, it shall be lawful for any persons interested in the lands so capable of being drained or improved, and who shall be desirous for that purpose to execute all or any of the works herein-after mentioned, and shall be unable to execute such works by reason of the objection, absence, or disability of any person whose land, property, or rights would be entered upon, cut through, interfered with, or affected by or for the purpose of such works,” to apply to the Sheriff for an order permitting the draining with an outfall through the land specified (s. 1). The Sheriff may make inquiry, and he may grant the order if he is satisfied that “the benefit to be derived from such drainage or improvement outweighs the damage to be done thereby, and the proposed method of drainage is in the whole circumstances the best, and that such drainage or improvement may be effected without material detriment to the lands, property, or rights so proposed to be entered upon, cut through, interfered with, or affected, and that the damage done may be adequately and effectually compensated under the provisions of this Act” (s. 5). The Act contains further provisions for compensation: the removal of obstructions from rivers; protection of salmon fisheries, mills and dwelling-houses; and entry on the lands in order to execute and maintain the works on obtaining permission from the Sheriff. Under the Public Health Act, 1867, s. 76, upon a requisition in writing by not fewer than ten inhabitants of a district, the local authority are bound to meet and consider the propriety of forming a special drainage district. The special drainage district is managed by a sub-committee appointed by the district committee (L. G. Act, 1889, s. 81). (See PUBLIC HEALTH, *Special District*, under head *Drainage*.) For the provisions of the Public Health Acts as to drainage, see ss. 71 to 92 (45 & 46 Vict. c. 11; 44 & 45 Vict. c. 37, ss. 5, 29) (providing channels for carrying off acids from works). See also Rivers Pollution Acts (39 & 40 Vict. c. 75, and 56 & 57 Vict. c. 31).

**Drawn Teind.**—Prior to 1560 the titular usually made his right effectual by drawing the *ipsa corpora*, subject to certain regulations. The owner of the crop notified the titular to teind the corn by a certain day. If the titular failed to do so, the owner himself, in presence of witnesses, teinded the corn and stacked the teind sheaves on the ground, where he looked after them till the beginning of November. Subsequently, if still unremoved, the sheaves were at the titular's risk. Not uncommonly, however, he arranged with the owner for delivery, once a year, of a fixed number of bolls in place of the *ipsa corpora*.

After the Reformation, and particularly by the Act 1606, c. 8, proprietors or heritors were entitled, fifteen days after the grain was cut, to require titulars to teind the corn within eight days; and if the latter neglected to do so, the former were free to teind and stack it themselves. The Acts 1612, c. 5, and 1617, c. 9, contained some variations in the previous law, and about this time the levying of teinds by rental-bolls became prevalent. If the titular desired to discontinue this method of payment, it was necessary for him to issue a prohibition against all persons meddling with the teinds,—publication of the writ of inhibition being made at the church of the parish

where the lands lay. The Act 1633, c. 17, put an end to the practice of titulars drawing teinds,—ordaining that each heritor should have the leading of his own teind after the same had been lawfully valued, and the price thereof paid or provided for. Abuses, however, arose out of this enactment,—heritors, after instituting processes of valuation of the teinds, getting warrants to lead and taking no further steps towards valuation. A remedy for this was provided by the Act 1693, c. 23, which declared that a warrant to lead should remain in force only until a protestation for not insisting should be obtained by the titular.

**Drilling (Illegal).**—In 1819 an Act was passed (60 Geo. III. and 1 Geo. IV. c. 1) to prevent the training of persons to the use of arms and to the practice of military evolutions and exercise. By this Statute it is provided (s. 1) that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from Her Majesty, or the Lieutenant or two Justices of the Peace of any county or riding, or of any stewardry, by commission or otherwise, for so doing, are prohibited. The punishment of attending such meetings or assemblies for the purpose of drilling or training others, or assisting in so doing, is penal servitude for seven years, or imprisonment for two years. The penalty of attending such meetings or assemblies for the purpose of being drilled or trained is fine and imprisonment not exceeding two years. Persons so assembled (s. 2) may be dispersed, or detained and required to give bail, and prosecuted. Every action or suit (s. 6) brought against any inferior judge or officer of the law for anything done by them in pursuance of the Act must be commenced within six calendar months of the facts committed; and if the defenders are successful in such action or suit, they are to be entitled to treble costs or expenses. No person (s. 7) shall be prosecuted for an offence against the Act unless such prosecution shall be commenced within six calendar months after the offence committed.

**Driving, Furious or Reckless.**—See FURIOUS RIDING AND DRIVING.

**Drove Road.**—A drove or drift road, for the transit of cattle may be either a public or a servitude road. If the benefit of the road is enjoyed only by a definite farm or definite farms in the neighbourhood, it is a servitude road. On the other hand, if it is used by the farmers of the district generally for the purpose of driving cattle to and from the markets, it is of the nature of a public road (*Marquess of Breadalbane*, 1849, 9 D. 210; revd. 7 Bell's App. 43). See ACTUS.

**Drug; Druggist.**—See PHARMACY ACT; POISONS; DRUGGING; CULPABLE HOMICIDE.

**Drugging.**—Administering drugs “so as to stupefy and deprive of consciousness,” although there be no further intent, and no damage result,



is sufficient to constitute an offence, unless it be done for a lawful purpose (Macdonald, *Crim. Law*, 3rd ed., 174). "No case has as yet occurred in which the act stood alone. . . . But it seems impossible to doubt the relevancy of such a charge" (*ib.*).

Drugging the owner or custodian of property is an aggravation of theft (*Wilson and Others*, 1828, Bell, *Notes*, 22; *Stuarts*, 1829, Bell, *Notes*, 22.—As to whether this constitutes robbery, see Macdonald, 37, 38, and notes).

In the case of *Alexander Mitchell*, 1833 (Bell, *Notes*, 90), the charge was one of feloniously administering drugs to the injury of the person, and with the aggravation of having done this with the intention of preventing one of the lieges from following his lawful business or exercising his political rights.

It is culpable homicide if, for a frolic, something likely to sicken the person taking it be mixed with food or drink, and death ensue, even though the substance administered be not in itself dangerous to life (Hume, i. 237; Alison, i. 99; Macdonald, 134). Improperly giving laudanum to a child to put it to sleep also constitutes culpable homicide (*Crawford*, 1847, Ark. 394; *Hamilton*, 1857, 2 Irv. 738).

To have connection with a woman whose resistance has been overcome by drugging her is rape (Hume, i. 303; Burnett, 103; Alison, i. 211; *Fraser*, 1847, Ark. 280 (opinions); *Sweenie*, 1858, 3 Irv. 109; Macdonald, *Crim. Law*, 166, note 11).

The punishment of drugging is either imprisonment or penal servitude. Forms of charge will be found in Macdonald's *Crim. Law* (p. 388), and in Mr. N. D. Macdonald's *Manual of Criminal Procedure Act* (p. 28).

**Drunkards, Habitual.**—*Civil.*—Until within recent years the law of this country did not treat habitual drunkards as a distinct class, requiring special treatment. So far as they came within the ken of the law, they were considered not with the object of curative or remedial treatment, but from an apprehension of the consequences to their relatives from their prodigality and waste. Those in whom habitual drunkenness develops a dangerous profuseness may be dealt with by the procedure of INTERDICTION (*q.v.*). This may be judicial or voluntary, *i.e.* imposed by the Court or self-imposed. It is defined by Erskine (i. 7. 53) as "a legal restraint laid upon those who, either through their profuseness or the extreme facility of their tempers, are too easily induced to make hurtful conveyances." But judicial interdiction is going into desuetude, and voluntary interdiction is being superseded by trust deed. It has, moreover, serious limitations. The interdictors have no power of sequestrating the person of the interdicted; they do not acquire the control or management of his property, but are appointed merely *ad auctoritatem præstandam*: only deeds affecting heritage come within its scope, and even these, if granted without consent of the interdictors, are not null, but reducible on proof of lesion; and judicial interdiction can be imposed only by the Court of Session, not by the Sheriff.

Persons who suffer from *delirium tremens* are sometimes received into lunatic asylums, but dipsomania and facility of temperament, the frequent results of habitual drunkenness, cannot be treated under the Lunacy Acts, since they fall short of actual insanity. Provision has therefore been made by the Inebriates Acts, 1879 and 1888,—*viz.* The Habitual Drunkards Act, 1879, amended by the Inebriates Act, 1888,—for providing retreats for those

who suffer in this way. A retreat is defined as "a house licensed by the licensing authority named by this Act for the reception, control, care, and curative treatment of habitual drunkards," and habitual drunkard means "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself, or to others, or incapable of managing himself or herself, and his or her affairs" (1879, s. 3). A local authority, which in counties is the county council and in burghs the provost and magistrates (1879, s. 5, Sched. 1; Local Government (Scotland) Act, 1889, s. 11 (5)), may grant a licence to one or more persons to keep a retreat for habitual drunkards. The licence is to be for a period not exceeding thirteen months. One at least of the persons to whom it is granted must reside in the retreat and be responsible for its management, and a duly qualified medical man must be employed as medical attendant (1879, s. 6). No licence is to be given to anyone licensed to keep a house for the reception of lunatics (1879, s. 7). Provision is made for the events of a licensee dying, becoming bankrupt, mentally incapable or otherwise disabled, and for the appointment of a deputy during temporary absence; also for discharge of the patients from a retreat which has become unfit for habitation (1879, ss. 8, 9; 1888, s. 3).

Any habitual drunkard desirous of entering a retreat may make application to the licensee in a form given in a schedule to the Act, stating the time during which he undertakes to remain in it. His application must be accompanied by the statutory declaration of two persons that he is an habitual drunkard within the meaning of the Act, and his signature must be attested by two justices who have also satisfied themselves of this fact. The justices must explain to the applicant the effect of his application and his reception into the retreat, and must state that he understood these (1879, s. 10; 1888, s. 4). After an applicant is received into a retreat, he cannot leave it until the expiration of the term mentioned in his application, but this is not to exceed twelve months. He may be discharged earlier by the order of a justice of peace or magistrate having jurisdiction in the place where the retreat is situated, upon request of the licensee, or by order of the Home Secretary on the recommendation of the inspector of retreats or his assistant, or by a judge of the High Court or County Court judge in England, or the Sheriff of the district within which the retreat is situated in Scotland, upon the report of someone whom he has authorised to visit and examine the patient (1879, ss. 10, 12, 15, 18). There is no provision for a judge of the Court of Session exercising this power. Provision is made in the Statutes for a patient, on licence from a justice or magistrate having jurisdiction as above mentioned, residing temporarily outside the retreat for the benefit of his health (1879, ss. 19-22). A patient who escapes may be apprehended upon warrant and brought back (1879, s. 26). The Home Secretary may appoint an inspector and assistant inspector of retreats, who must visit every retreat at least twice a year (1879, ss. 13, 15). He may also make rules for the management of a retreat (1879, s. 17). The rules at present in force are those dated 10 August 1888. They require *inter alia* that the licensee shall, within one month from the granting of the licence, draw up and submit for the approval of the inspector, regulations and orders for the domestic arrangements of the retreat and the management and treatment of the inmates.

Certain offences are created by the Habitual Drunkards Act, such as failure on the part of the licensee to comply with the provisions of the

Act; neglecting a patient by the licensee; ill-treatment or neglect of a patient by a servant employed in a retreat; knowingly assisting a patient to escape; without authority of the licensee or medical officer, bringing any intoxicating liquor, sedative narcotic, or stimulant drug into a retreat, or giving it to a person detained there (1879, ss. 23, 24). Any of these offences may be visited with a penalty of £20 or three months' hard labour (1879, s. 28). If a patient refuses to conform to the rules of a retreat where he is detained, he may be fined £5, or suffer seven days' imprisonment (1879, s. 25).

Sec. 31 (1879) requires that any action against any person for anything done in pursuance of these Acts shall be commenced within two years after the thing done, and that written notice of such action, and the cause thereof, be given one month before its commencement. But this seems to be repealed by the Public Authorities Protection Act, 1893, s. 2. In place thereof, sec. 1 of that Act provides that the action shall be raised within six months after the act or neglect complained of, and there is no requirement of notice being given.

The original Act was only to remain in force for ten years, but it was made permanent by the amending Statute.

There is no retreat in Scotland licensed in virtue of these Acts, but there are unlicensed institutions, where inebriates, whose friends can induce them to enter, are cared for. The keepers of these retreats have no legal power of detention. A number of habitual drunkards also enter lunatic asylums as voluntary patients. In order to do this they must first obtain the permission of the Board of Commissioners in Lunacy, which in practice is never refused. After reception into an asylum, they can only leave it on giving three days' notice, and during their residence the medical superintendent has the same authority over them that he has over the lunatic patients. There is a prospect of early legislation on the subject of habitual drunkards, following on the Report of the Scottish Departmental Committee on Habitual Offenders, Inebriates, etc., presented to Parliament 25 April 1895.

*Criminal.*—The expression habitual drunkard is not known to the common law.

By the Burgh Police (Scotland) Act, 1892, s. 382: "It may be charged, as an aggravation of the offence of being drunk and incapable, that the accused person has, within the twelve months preceding, been three times previously convicted of such offence." There is a similar provision in the Greenock Police Act, 1877, s. 245. Under the Prevention of Cruelty to Children Act, 1894, s. 11, where it appears to the Court before which any person is convicted of the offence of cruelty within the meaning of that Act, or of any of the offences mentioned in the schedule to the Act, that that person is a parent of the child in respect of whom the offence was committed, or is living with the parent of the child, and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 and 1888, the Court may, in lieu of imprisonment, make an order for his detention for a period not exceeding twelve months in a retreat under the said Acts, the licensee of which is willing to receive him; but no such order can be made unless the convicted person, having had notice of the intention to allege habitual drunkenness, consents to the order being made.

**Drunkenness.**—See INTOXICATION.

**Dry Multure.**—In the servitude of THIRLAGE (*q.v.*) this term is applied to the case of a person who pays to a mill a certain yearly sum of money or quantity of grain, in the name of multure, whether he grinds at the mill or not.

**Duelling**, or single combat, was an institution of very great antiquity. Duels may be divided into two classes: (1) the judicial duel or trial by combat; and (2) the private duel, an outcome of the laws of chivalry. Trial by combat was probably introduced into Scotland, as it was into England, at the time of the Norman Conquest, and was used as a method of determining both civil and criminal questions. It fell into desuetude, but was revived in England in 1817 by Lord Ellenborough, who offered battle in reply to a charge of murder. The ancient law was held to be still in force, and on the challenged refusing to fight, the challenger was allowed to go free; but the law was repealed the following year (59 Geo. III. c. 46).

The private duel has passed through various stages of recognition and repression. It was at one time in vogue in Scotland, but in 1600 (c. 12) a duel without licence from the king was made punishable by death. It was further enacted in 1696 (c. 35), that whatever person, principal or second, should challenge or accept a challenge to a duel, or otherwise engage therein, should be punished by banishment and escheat of moveables, though no actual fighting should take place. These laws have been repealed (59 Geo. III. c. 70), and the killing of an adversary in a duel is now regarded as murder at common law, even though the survivor be the person challenged (Hume, i. 230; Alison, i. 53; Macdonald, 124). Numerous instances are cited by Hume where the law was carried out in all strictness, but a jury will take all the circumstances into consideration (see trial of *Stewart of Duncarn*, 1822). Duelling not resulting in death is a breach of the peace (Macdonald, p. 189). If it be known that a hostile challenge has been sent and received, the parties may be bound over by sureties to keep the peace under a specified penalty, and they may be committed to prison till caution is found. Seconds were included in punishment for breach of the peace (*Burn and Others*, 1842, 1 Broun, 1).

**Duke.**—A noble of the highest rank in the British Peerage. The title was introduced into Scotland about the end of the fourteenth century by Robert III., when he created his son, Prince David, Duke of Rothesay. None of our dukedoms have ever been separate sovereignties, as some have been on the Continent. The possession of a dukedom does not give its holder any privileges, save that of precedence, beyond those of a peer of any other rank. Royal princes on whom dukedoms have been conferred retain their right to be styled "Royal Highness." A duke, not of the royal family, is, in formal language, "The Most Noble the Duke of \_\_\_\_\_," and is addressed "My Lord Duke," or "Your Grace."

A duke's parliamentary robes are scarlet with four doublings of ermine. His coronet is a circle of gold, on which are eight golden "strawberry" leaves. Inside the circle is a cap of crimson velvet, surmounted with a golden tassel and edged with ermine. When the coronet is represented heraldically, with or without the cap, five of the leaves are shown, the leaf at each end being in profile.

By courtesy the eldest son of a duke bears one of his father's titles,—

that of a marquise or an earldom,—and takes precedence after marquises. The daughters are each “The Right Honourable the Lady” (with Christian and surname added). The younger sons are “The Right Honourable the Lord” (with Christian and surname).

For the designation of a peer in a summons, and style of signature of a peer, see DIGNITIES.

See also PRECEDENCE; DIGNITIES; PEERAGE.

**Dumb.**—See WITNESS; DECLARATION BY PRISONER.

**Dung.**—Apart from express stipulation in a lease, “there is a rule of the common law applicable to agricultural leases, and which is founded upon convenience and fortified by sound sense, to the effect that in the interests of good husbandry the dung which is produced on a farm shall be used for the cultivation of that farm” (*Reid's Eers.*, 1890, 17 R. 519, at p. 522). A tenant cannot, therefore, carry away the dung from a farm; and if he do so the landlord may have it brought back by summary complaint (*Curcay*, 1852, 14 D. 528). These rules apply equally to the dung made from the straw of the penultimate crop, which must be used for the way-going crop (*Forrester*, 1808, M. App. Tack, 16; see also *Pringle*, 1796, M. 6575; *D. Roxburghie*, 1816, Hume, 867; revd. 2 Bligh, 156; *Clerk*, 1801, Hume, 867 n; *Murray's Trs.*, 1889, 26 S. L. R. 762). Conditions are usually inserted in a lease as to the terms on which the dung left on a farm is to be taken over by the landlord or the incoming tenant (see Rankine, *Leases*, 385–6, 391–2, and cases there cited).

In a question between the heirs and executors of a tenant, the dung on a farm is heritable *destinatione* (*Reid's Eers.*, 1890, 17 R. 519). See under CROP; LEASES.

**Dwelling-house.**—See CITATION; EXECUTION; FRANCHISE; HAMESUCKEN; HOUSING OF THE WORKING CLASSES.

**Dying Deposition.**—See DEPOSITION BY DECEASED PERSONS, ETC.

**Dyvoor.**—The word “dyvoor” is derived from the French *devoir*, to owe, and was formerly used in Scotland to denote an insolvent debtor who made over his estates to his creditors by *cessio bonorum*, in order to obtain relief from personal diligence and imprisonment. The laws relating to such debtors were formerly marked by a harshness and severity which owed its origin to the adoption in this country of various regulations existing in the law of France, from which the Scottish process of *cessio bonorum* itself received its distinguishing features. Thus, a French debtor of the 17th century, who desired to make a judicial *cession des biens*, was required to appear in Court in a garb which, according to the fashion of that age, was held to mark a special degree of infamy, and under the provisions of an *arrêt* of 1592 he received from his creditors a green bonnet, which he was obliged to wear as a condition of obtaining immunity from imprisonment. Within fourteen years from the *arrêt* of 1592, the Court of Session passed an Act of Sederunt, dated 17 May 1606, “concerning dyvoris,” requiring

the magistrates of Edinburgh "to cause big, mak and erect ane pillerie of hewin stane, neir to the mercat croce of Edinburgh, upon the heid thair of ane sait and place to be maid quhair upoun in tyme cuning sall be sett all dyvoris, and sall sitt thairon ane mercat day from 10 hours in the morning, quhill ane hour efter dinner, and the saidis dyvoris, before their libertie, and cuning furth of the tolbuith of Edinburgh, upon their awn chairges, to caus mak and buy ane hatt or bonnet of yellow coloure to be worn be thame all the tyme of thair sitting on the said pillerie, and in all tyme thairefter, swa lang as they remane and abide dyvoris, with speciall provisioun and ordinance, if at any time or place efter the publicatioun of the said dyvoris at the said mercat croce any person or personis declarit dyvoris beis fundin wantand the foresaid hatt or bonnet of yellow coloure, toties it sall be lawful to the Bailleis of Edinburgh or any of his creditoris to tak and apprehend the saids dyvor and put him in the tolbuith of Edinburgh thairin to remain in sure custodie, the space of ane quarter of ane yeir for ilk fault and faillie foresaid." "The reason of which severity is to deter *Decectores* who lavishly spend their estates, and continue trade when they know themselves absolutely broken" (Stair, iv. 52. 34). The pillory erected by the magistrates under the Act of Sederunt was commonly known as the "dyvour stone" (*ib.*). By Act of Sederunt of 26 February 1669, anent "The habite of bankrupts," the yellow hat or bonnet was replaced by a complete habit, which was required to be "a coat and upper garment which is to cover their cloaths, body and arms, whereof the one half is to be of yellow, and the other half of a brown colour, and a cap or hood, which they are to wear on their head party coloured as said is." In consequence of the want of due observance of this Act, the requirement of the dyvour's habit was enforced and declared to be compulsory by Act of Sederunt of 23 January 1673. It was held "that in a *cessio bonorum* the law makes no distinction as to the dyvour's habit between a male and a female prisoner, at the same time it is apparent that the habit prescribed by the Act of Sederunt was meant only for males" (*Rowley*, 1775, 5 Bro. Supp. 413). The Act of Sederunt of 18 July 1688 enforced the requirement of the habit, which was thereby prescribed to be "a bonnet partly of a brown and partly of a yellow colour, with uppermost hose or stockings on his legs half brown and half yellow colloured, conform to a pattern delivered to the Magistrates of Edinburgh to be kept in their tolbooth." It was, however, provided that the Court might dispense with the habit "in cases of innocent misfortune liquidly libelled and proven." By the Act 1696, c. 5, the Court was forbidden to dispense with the bankrupt's habit unless in the summons and process of *cessio* the bankrupt's failing through misfortune be lybelled, sustained, and proven. The strict rule of the Statute was, however, gradually relaxed in practice, until the habit was uniformly dispensed with. The last instance in which the Court refused to dispense with the habit was in the case of *Dick*, 1775, 5 Bro. Supp. 411, where the debtor had been guilty of smuggling (More's *Notes to Stair*, cccxxxvii). By the Cessio Act of 1836 (6 & 7 Will. iv. c. 56, s. 18), the dyvour's habit was abolished.

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**Earl** (*comes*).—A noble of the third rank in the British Peerage. Earls appear in the Parliaments or National Councils as early as 1114–15 (Lib. de Secone, 1, Acts Sc. Parl., Rec. ed., 63), and, till the institution of the rank of the dukedom, are of the highest rank of temporal lords. Anciently, the earl was the officer in charge of a district, which, from the fact that it was

placed under an earl, was called an earldom, county, *comitatus*. The rank and title of earl is now dissociated from all territorial or official character.

The earl's parliamentary robes are scarlet with three doublings of ermine. His coronet is a circle from which rise eight rays alternated with eight conventional leaves, all of gold. The rays, which rise higher than the leaves, are capped each with a large pearl. Inside the coronet is a cap similar to a duke's (see DUKE). When the coronet is represented heraldically, five rays and four leaves are shown. An earl is styled, in formal terms, "The Right Honourable the Earl of \_\_\_\_\_," and is addressed "My Lord," "Your Lordship." His wife is "The Right Honourable the Countess of \_\_\_\_\_," and is addressed "My Lady," "Your Ladyship." His eldest son ranks next after viscounts, and takes one of his father's baronial or viscounty titles. The younger sons are "The Honourable" (with Christian and surname). The daughters are "The Right Honourable the Lady" (with Christian and surname).

For the signature of an earl and his designation in a summons, see DIGNITIES.

See also DIGNITIES: PEERAGE: PRECEDENCE.

**Earnest.**—Earnest, or *arles*, is a sum of money, or other moveable, given by one party to the other in a verbal contract of sale, hiring, or the like, as a symbol of completed bargain (Dickson on *Evidence*, s. 847). If large in proportion to the consideration, it is held as part of it: if merely nominal in proportion to the consideration, it is not computed as part of it, and is in that case called *dead* earnest (Dickson, s. 849; Ersk. iii. 3. 5. But cf. Stair, i. 14. 3; Mackenzie, *Jurist*, iii. 3. 1).

The giving of earnest is not indispensable, unless where this is established by uniform and notorious local custom (Bell, *Princ.* s. 173 (1); Dickson, s. 848). Where the giving of earnest is so established, there is *locus penitentiae* until it is given: and the return of the earnest will not dissolve the bargain (Bell, *ib.*; Wallace, 1808, Hume, *Dec.* 853); unless this also is in accordance with local usage (*Watt*, 1703, Mor. 8472).

The giving and taking of earnest is, in the general case, evidence of a concluded bargain, so that neither party can thereafter resile by forfeiting or restoring the arles (Stair, i. 14. 8; Ersk. iii. 3. 5). It is a mark of concluded consent in a bargain which may be validly contracted by simple verbal paction. But it cannot supply the want of written evidence in contracts which require that solemnity for their completion (Ersk. iii. 3. 3; Lawson, 1699, Mor. 8402; Dickson, ss. 560, 847). In this last case it has not the effect of *rei interventus*.

According to Prof. Rankine, in treating of leases for not more than a year, "the bargain seems to be neither the better nor the worse for the giving of arles or earnest" (*Leases*, 111).

For the Roman law on the subject, see ARREHE.

See also REI INTERVENTUS: MASTER AND SERVANT: LEASES.

**Eavesdrop.**—Eavesdrop, otherwise known as stillicide, is a positive servitude, in virtue of which the owner of a dominant tenement may allow rain collected on his tenement to fall on the lands of the owner of the servient tenement. By the common law of Scotland the owner of one property is bound to receive rain and other surface water which flows from the property of another proprietor by natural process. Building on a property

alters the natural flow of rain-water, and may in certain cases so materially alter it that certain building operations may be prevented. Without a servitude of eavesdrop the owner of land is entitled to collect the rain which falls on his lands and let it reach the ground anywhere he pleases on his own ground. Thus, if he has built a house on his property, the roof prevents the rain reaching the ground where it naturally would fall, and the rain-water is collected from the roof and allowed to reach the ground at some special spot. If that spot is within the owner's own boundaries, then it is presumed that the rights of the neighbouring proprietors have not been materially affected, and they therefore have no right to object. But if, on the other hand, the rain-water is collected in a cistern, or on a roof, and is conducted so as to fall on a neighbour's ground, or quite close to his boundary-line, then the neighbour has a right to object, unless the first-mentioned owner of land has a servitude of eavesdrop over the other lands. According to this rule, no person, unless he has the servitude-right, is allowed to build quite close to the boundary of his property, and in most cases the use of a spout or pipe, to prevent water dripping over the boundary, will not be held sufficient (*Stair*, ii. 7. 7). The Roman law fixed two and a half feet as the width of the space which should be left between the walls of a building and the boundary of the property on which it was built; and though there is no statutory rule in Scotland in regard to the matter, usage seems to have fixed a limit, at least in certain burghs. In *Kirkcudbright* it was fixed at eighteen inches (*Clark*, 1760, *Mor.* 13172; *Gariochs*, 1769, *Mor.* 13178). Where usage had not fixed the distance, a discretionary power in regard to the matter was vested in the Dean of Guild, subject to review in the Court of Session (*Ersk.* ii. 9. 9).

The servitude of eavesdrop does not imply a right of property in the space left vacant in which the water is to fall. The fact that there is a servitude implies that the property over which the servitude exists belongs to another: and that other may build on his property, provided he makes proper arrangements for carrying away the water which he is bound to receive by reason of the servitude (*Scouller*, 1832, 10 S. 241). Any building which he may put up must not interfere with the servitude-right.

The servitude of eavesdrop may be constituted by use for the prescriptive period (*Stirling*, 1752, *Mor.* 14526), or by grant, either express or implied. The servitude may be lost in the same way as other servitudes,—either by renunciation or by disuse for the prescriptive period. In several cases where the servitude has arisen from implied grant or prescriptive use, it has been difficult to distinguish between the servitude right of eavesdrop and the right of property in the ground, as the use of a right of eavesdrop in such a case might be used as an adminicle of evidence of property. Accordingly, questions have been tried in one action (first), to prove that the boundary of a property was at a certain place, and (second), failing that, to prove that there was a right of eavesdrop at that place (*Steele*, 1832, 10 S. 857).

[*Bankt.* b. ii. tit. 7, s. 13; *Stair*, b. ii. tit. 7, s. 7; *Ersk.* b. ii. tit. 9, s. 9; *Bell*, *Prin.* ss. 941, 1004; *Rankine on Landownership*, 461.]

**Eaves-droppers.**—Statements or confessions overheard by “eaves-dropping” are not excluded from proof (*Dickson*, s. 348; *Johnston*, 1845, 2 *Brown*, 401. See cases of *Tait and Stenenson*, 1824, and *Edmond*, 1830, in *Alison* ii. 585; and *McKinlay and Gordon*, 1829, *Alison*, ii. 537). In England, “eaves-droppers” are persons “who at night listen about the



doors or windows, or under the eaves of houses, to hearken after discourse and raise mischievous tales" (Tait, *Justice of the Peace*, 2nd ed., 361). The offence is punishable in England, by statute, by fine and imprisonment; and is supposed to be punishable at common law in Scotland, if not under the early Scots statutes (Tait, *ib.*).

**Ecclesiastical Buildings and Glebes Act:** *Proceedings in Sheriff Court*.—These are regulated by the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, 31 & 32 Vict. c. 96.

The matters in which the Act gives jurisdiction are proceedings relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manse: or to the designing or exchanging of glebes or additions to glebes: or to the designing or exchanging of sites for, or additions to, churchyards, and the suitable maintenance thereof, including the building or repairing of churchyard walls (Act, s. 3).

These proceedings do not begin before the Sheriff, but before the presbytery: but whenever, with regard to such matters, the presbytery has pronounced any order, finding, judgment, or decree (incidental or otherwise, *Heritors of Pitsligo*, 1879, 6 R. 1063), the minister or any heritor may remove the whole case to the Sheriff Court, by appeal to the Sheriff within twenty days; otherwise the order, finding, judgment, or decree becomes final (Act, s. 3 (but see opinion of Lord President in *Walker*, 1876, 3 R. at p. 504)).

Appeal is by summary petition to the Sheriff of the county in which the parish concerned is situated (if situated in two counties, then to the Sheriff of either), praying him to stay the proceedings before the presbytery and to dispose of the same himself (Act, s. 4).

The appeal, within ten days of its presentation, must be intimated to every heritor, to the minister of the parish, and the clerk of the presbytery (Act, s. 5).

The Sheriff, having satisfied himself that the intimation has been duly made (if not satisfied, he orders such intimation as he thinks necessary), then proceeds to consider the circumstances, and hear parties or their agents without written pleadings, unless he specially orders them: if required, he must personally inspect the premises or locality (Act s. 13), and he must take a note of the proceedings and of any evidence which is laid before him. Thereafter he disposes of the petition (including the question of expenses (Act, s. 15)), as seems just (Act, ss. 6, 7, 8).

All orders, findings, judgments, interlocutors, or decrees of the Sheriff are final, unless appealed to the Lord Ordinary on the Teinds within twenty days of their date (Act, ss. 14, 16, 17). The note of appeal is by writing on the margin of the deliverance appealed against, or by a separate note of appeal lodged with the Sheriff Clerk, signed and dated by the appellant or his agent (Act, s. 16). Within two days of such appeal being taken, it must be intimated by the Sheriff Clerk to the respondent or his agent (Act, s. 19), and the process transmitted to the Depute Clerk of Session attached to the Bar of the Lord Ordinary (Act, s. 20).

The effect of such appeal is to submit to the review of the Lord Ordinary every deliverance of the Sheriff (except such as have become final), not only at the instance of the appellant but also at the instance of every other party appearing in the appeal (Act, s. 18). The action is entirely removed to the jurisdiction of the Lord Ordinary, whose findings are final and not subject to review (Act, s. 20).

The special regulations for the various proceedings competent under the Act are set forth in secs. 7, 8, 9, 10, 11, 12.

[Dove Wilson, *Practice*, pp. 403-7; Mackay, *Manual*, p. 597.]

**Edict Nautæ, caupones, stabularii.**—See NAUTÆ, CAUPONES, STABULARII.

**Edictal Citation.**—See CITATION.

**Education.**—Education in Scotland is regulated chiefly by the Education (Scotland) Act, 1872 (35 & 36 Vict. c. 62), which repealed all former Statutes so far as inconsistent with its provisions. But many Scots Acts dealing with the question had been passed before 1872, and the extreme importance of the subject for the national welfare was recognised by Statute so long ago as 1494, c. 54. It will be convenient briefly to consider, *first*,—

#### THE ACTS PREVIOUS TO 1872.

Of these Acts, the following four were the most important, and are recited in the preamble to the Act of 1872:—

1. The Act of 1796 (Will. III. c. 26).—By this Act it was provided that “there be a school settled and established, and a schoolmaster appointed, in every parish not already provided, by advice of the heritors and minister of the parish; and for that effect that the heritors in every parish meet and provide a commodious house for a school, and settle and modify a salary to a schoolmaster which shall not be under one hundred merks (£5, 11s. 1½d.) nor above two hundred merks, to be paid yearly at the terms, Whitsunday and Martinmas, by equal portions, and that they stent and lay on the said salary conform to every heritor’s valued rent within the parish, allowing each heritor relief from his tenants of the half of his proportion for settling and maintaining of a school and payment of the schoolmaster’s salary.”

2. The Act of 1803 (43 Geo. III. c. 54).—On the preamble that the salaries fixed by the above Act were altogether inadequate, they were to be raised to not less than three hundred, nor more than four hundred, merks, and to be fixed by the heritors and ministers. A schoolhouse was to be provided in every parish where there was none already; and in parishes of great extent or population, a salary of six hundred merks might be provided, which sum might be divided among two or more teachers. In such case, the heritors were exempted from providing school premises (s. 11; and *Macalister*, 1854, 16 D. 736). The schoolmasters were to be approved by the presbytery, and were required to sign the Confession of Faith and the formula of the Church of Scotland. The heritors and ministers were to fix the fees, and the schoolmaster was “obliged to teach” such poor children as they recommended. The ministers were to superintend the schools, and the presbyteries were to take cognisance of the schoolmaster’s conduct, and had power, after proof, to pass sentence of suspension or deprivation, their judgment being final. The offences with which the schoolmaster might be charged were: “neglect of duty,” “immoral conduct,” or “cruel and improper treatment” of his scholars. The schools established under sec. 11 of this Act, additional to the original parish schools, were usually termed “side schools.”

3. The Act of 1838 (1 & 2 Vict. c. 87).—On the preamble that various parishes had been disunited *quoad sacra*, and places of worship erected in the Highlands, and that the parish schools in the Highlands and Islands were totally inadequate to the education of the people, the Treasury were authorised to provide for the endowment of additional schools in such parts of such divided parishes as they should judge proper. The money was to be invested by them, and the proceeds paid to schoolmasters in the said parishes after the heritors had provided schoolhouses. The teachers were subject to the provisions of the Act of 1803. The schools established under this Act were usually termed “parliamentary schools.”

4. The Parochial and Burgh Schoolmasters Act (Scotland), 1861 (24 & 25 Vict. c. 107).—By this Act the salaries of schoolmasters were raised to a minimum of £35 and a maximum of £80. The heritors and minister might discontinue existing “side schools” on providing to the schoolmaster an annual payment equal in amount to the full salary to which he was entitled, together with the annual value of any dwelling-house to which he may have been entitled as schoolmaster. They were also authorised to appoint female teachers. Instead of presbyteries, examiners appointed by the Universities were to examine schoolmasters. Schoolmasters, instead of signing the Confession of Faith and formula of the Church of Scotland, had to make a declaration that they would not teach any opinions opposed to the Bible or the Shorter Catechism, nor exercise their office to the prejudice of the Church of Scotland.

The cognisance of the schoolmaster’s conduct, given to the presbytery by the Act of 1803, was transferred to the Sheriff. Provision was made for enforcing the resignation of a schoolmaster who was unfit or inefficient. These provisions are still partially in force, and are referred to later on, under the head of *Teachers*. For further particulars of the law relating to education, previous to 1872, see the chapters on schools in Dunlop’s *Parochial Law*, and in Duncan’s *Parochial Ecclesiastical Law*.

### *Second.* THE ACT OF 1872 AND SUBSEQUENT ACTS.

By the Short Titles Act, 1896, the following Acts may be cited as the Education (Scotland) Acts, 1872 to 1893, viz.:

The Education (Scotland) Act, 1872 (35 & 36 Vict. c. 62).

The Education (Scotland) Act, 1878 (41 & 42 Vict. c. 78).

The Public Schools (Scotland) Teachers Act, 1882 (45 & 46 Vict. c. 18).

The Education (Scotland) Act, 1883 (46 & 47 Vict. c. 56).

The Parliamentary Grant (Caithness and Sutherland) Act, 1889 (52 & 53 Vict. c. 75).

The Education of Blind and Deaf-Mute Children (Scotland) Act, 1890 (53 & 54 Vict. c. 43).

The Day Industrial Schools (Scotland) Act, 1893 (56 & 57 Vict. c. 12).

But there are other Acts not in the above list which partially affect the Education Acts, and which will be referred to in the proper place.

The subject of education may be treated under the following headings:—

I. *Constitution of School Districts.*

II. *Supply of School Accommodation.*

III. *The Scotch Education Department.*

IV. *Election of School Boards.*

V. *Powers and Duties of School Boards.*

VI. *Religious Teaching in State-aided Schools.*

VII. *School Board Finance.*

VIII. *Grants from Imperial Revenue.*

- IX. *School Board Teachers.*
- X. *Higher Class Public Schools.*
- XI. *Technical Schools.*
- XII. *Compulsory Education and Protection of Children.*
- XIII. *Industrial and Reformatory Schools.*
- XIV. *Educational Endowments.*
- XV. *Miscellaneous.*

### I. *Constitution of School Districts.*

The primary object of the Act of 1872 was to transfer the powers and duties hitherto resting on the heritors and ministers of each parish, in the matter of education, to public boards elected by the ratepayers.

Accordingly, under the Act of 1872 the country is divided into districts for the purposes of the Act. Every parish and every royal or parliamentary burgh (as also eight burghs scheduled to the Act) is constituted a school district, with a school board over it (ss. 1-8). The area of a parish is exclusive of any royal or parliamentary burgh situated therein, and the area of such burgh is deemed to be the limits within which the municipal or police assessments are levied (s. 9). In every parish, therefore, not wholly comprised within a burgh, a school board is constituted, and in a parish partly landward and partly burghal there is a school board for the landward part, while the burghal part is under the jurisdiction of the burgh school board. Two or more parishes or parts of parishes, united either *quoad omnia* or *quoad sacra*, are to be deemed one parish (s. 10). Small or thinly populated parishes may be added to adjacent parishes by order of the Education Department (s. 17). Any two or more school boards may combine for any purpose relating to public schools, and the Education Department may enforce such a combination for the purpose of providing and maintaining a school (s. 42 and s. 13 Education Act, 1883). The Department may combine districts which have no public schools with other districts (s. 13, Act of 1883), and may order either that a school board be elected for any burgh or town not having previously had one, or that a burgh or town cease to have a separate school board, in which case it shall be under the jurisdiction of the school board of the parish (ss. 18, 19). By sec. 51 of the Local Government (Scotland) Act, 1889, and sec. 46 of the Local Government (Scotland) Act, 1894, wide powers of altering the boundaries of parishes are conferred upon the Secretary for Scotland, and such alteration is to have effect for school board, among other, purposes.

### II. *Supply of School Accommodation.*

All parish and burgh schools were by the Act of 1872 vested in the school board of the parish or burgh (ss. 32, 24). Parish schools were those which had been established under the Acts above referred to of 1696, 1803, 1838, and 1861. Burgh schools (which term includes "an academy, or a high school, or a grammar school") were also transferred from the town council to the burgh school board. A large number of schools had, at the passing of the Act in 1872, been provided by the Free Church and other religious denominations. As these schools had for the most part been built by subscriptions and donations, and were costing money for their maintenance, it was provided that the managers might, if they chose, escape further liability by transferring the premises to the school board, who, however, were not allowed to purchase, but could only accept the property as a gift (ss. 38, 39). (For an exhaustive opinion by the Lord Advocate (Young) and Solicitor-General (Rutherford Clark) on these sections, see

Graham's 9th ed. Sellar's *Manual*, p. 214.) Any property or money in trust for parish or burgh schools is transferred to the school board, and town councils are to pay to school boards whatever sum they have been accustomed to contribute to the burgh school out of the common good (s. 46). It has been held that this provision is applicable to all cases where in point of fact a contribution has been *in use* to be made by the town council, though there may have been no obligation to make such payment, and that a period much less than forty years suffices to establish a "custom" in the sense of the Act (*Perth School Board*, 1878, 6 R. 45). (On this point see also *Dunfermline School Board*, 1878, 6 R. 51; *Sutton School Board*, 1876, reported in Graham's 9th ed. Sellar's *Manual*, p. 220; *Dunbar School Board*, 1876, 3 R. 631; *Greenock School Board*, 1890, 17 R. 969.) Every school board must provide from time to time a sufficient amount of accommodation for the children of the parish or burgh (s. 26); but in considering the question, they may take into account every school, whether public or not, which is available for the district (s. 30). A school board is entitled to acquire, by agreement or by compulsory purchase, sites for school buildings. A member selling land to the board should do so under the provisions of the Lands Clauses Consolidation Act, 1845 (s. 37 and s. 31, Act of 1878: and see opinion of counsel quoted in Graham's 9th ed. Sellar's *Manual*, p. 228).

### III. *The Scotch Education Department.*

A Committee of the Privy Council on Education in Scotland, called "the Scotch Education Department," of which the Lord President of the Council is *ex officio* president, and the Secretary for Scotland vice-president, is instituted by the Act of 1872 and by the Secretary for Scotland Act, 1885. The principal duties of the Department are: (a) To regulate the distribution of the grant annually made by Parliament for education in Scotland (s. 67). (b) To frame the code of minutes in accordance with which these grants are made (ss. 5, 67). (c) To regulate and conduct the examination of candidates for certificates of competency as teachers (ss. 57, 58). The Department also regulate the conduct of school board elections, and determine the number of school board members for each district. Their consent is also required to any loan of money obtained by school boards for building purposes.

### IV. *Election of School Boards.*

Each school board must consist of not less than five nor more than fifteen members (Sched. B). Any person not being a teacher in a public or State-aided school, or holding an office of profit under the school board, is eligible for election (s. 12 and s. 21 Act of 1878). There is no provision in the Act as to whether women are entitled to vote, or to be elected. But by the Interpretation Act, 1889, the word "person" includes females. There has been no decision by the Court of Session as to whether married women under the curatory of their husbands are entitled to vote and to be elected, but in practice they are allowed to do so. The electors consist of all persons of lawful age whose names are entered on the valuation roll as owners or occupiers of lands or heritages of the annual value of £4 and upwards (Sched. B). The roll of electors is therefore not necessarily the same as the parish council or municipal roll, and requires to be separately prepared by the returning officer. The elections are triennial, and are conducted in accordance with regulations laid down by the Department. An election takes place in the spring of this year (1897). Every elector is entitled

either to give all his votes to one candidate or to distribute them among the candidates as he sees fit (Sched. B). This is termed the "cumulative vote," and was intended to protect denominational minorities, who can ensure the return of at least one representative by giving all their votes to him. The election is subject to the provisions of the Elections (Scotland) (Corrupt, etc.) Act, 1890 (53 & 54 Vict. c. 55). See CORRUPT AND ILLEGAL PRACTICES.

If the full number of members are not elected, the Department are not entitled to allow the candidates who have been nominated to be declared elected, and to fill up the vacancies (*Duncan*, 1892, 19 R. 594). The Department may, however, themselves nominate additional members, or may order a new election (s. 13). A large number of Sheriff Court decisions regarding school board elections will be found in *Graham's 9th ed. of Sellar's Manual*, pp. 181-206. See also SCHOOL BOARD ELECTION.

#### V. *Powers and Duties of School Boards.*

The management of public schools is vested in the school board established in the district. The board are bound to supply school accommodation: they appoint and dismiss teachers; and are entitled to obtain, by means of a school rate, the sum required to make up any deficiency in the school fund. But the question of what instruction is to be given in public schools is controlled by the Department, as any school claiming to share in the parliamentary grant must conform to the regulations of the Department as contained in the Code (s. 67). By the present Code (Article VI. (2)) the education given in schools claiming the grant "must consist chiefly of elementary instruction." But, at the same time, a grant is given for each scholar who passes in certain specific subjects, which subjects include Mathematics and Latin, Greek, French, and German (Article XXI.). An opinion has recently been expressed (per Lord President in *Jonathan Anderson's Trust*, 1896, 23 R. 594) that a school board are not entitled to impose rates for the establishment or maintenance of a secondary department in a public school. But they are certainly entitled, under the Code, to teach the above-mentioned specific subjects, and it seems impossible to separate the expense of a secondary department from that of the rest of the school. A public school is a school under the management of a school board, and is to be distinguished from a State-aided or denominational school, which, like the public school, receives its share of the parliamentary grant, but has no assistance from the rates. A member of a school board does not require to be an elector. He can resign on giving a month's notice in writing, and if the board do not fill up the vacancy within eight weeks, the Department may do so (s. 15, Act of 1878). A member absent from meetings for six months without cause ceases to be a member. Three members constitute a quorum; and if at any time there cease to be a quorum, the Department may supply the deficiency, either by nomination or by ordering a new election (s. 17, Act of 1878). A school board must elect its chairman at the first meeting after an election, and he has a casting as well as a deliberative vote (s. 21). The school board must also appoint a treasurer (s. 48), and may appoint a clerk (s. 52). Both these officials hold office "during the pleasure" of the board. The board may establish infant and evening schools (s. 40). It has been held that a school board are entitled to grant the use of school buildings for other than educational purposes, that being a matter within their discretion (*Hunter*, 1886, 14 R. 135). Parish council electors, on the application of not fewer than six of their number, and the parish council,

are entitled to use, free of charge, at all reasonable times, except during ordinary school hours, and after reasonable notice, for any purpose under the Local Government Acts, 1889 or 1894, the Poor Law Act, 1845, or the Education Acts, including public meetings in connection with the candidature of any person for the county or parish council, any room in a school receiving a grant out of moneys provided by Parliament (s. 31, Local Government Act, 1894). Any such room may also be used for the poll at a parliamentary or county council election (s. 6, Ballot Act, 1872, and s. 30, Local Government Act, 1889). It may also be used for certain purposes under the Allotments Act, 1892. School boards are liable in damages for accidents to children if caused by defective condition of school premises (*Cormack*, 1889, 18 R. 812).

#### VI. *Religious Teaching in State-aided Schools.*

The following quotation from the preamble of the Act of 1872 shows the policy of the Act in the matter of religious instruction: "Whereas it has been the custom to give instruction in religion to children whose parents did not object to the instruction so given, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not receive such instruction, and it is expedient that the managers of public schools shall be at liberty to continue the said custom. Be it enacted," etc. The schools which share in the annual parliamentary grant are of two kinds: (1) public, that is under the management of a school board, and (2) "any school which is, in the opinion of the Scotch Education Department, efficiently contributing to the secular education of the parish or burgh in which it is situated": but no grant is given in respect of religious instruction, nor to any school established after the passing of the Act not being a public school, unless the Department are "satisfied that no sufficient provision exists for the children for whom the school is intended, regard being had to the religious belief of their parents" (s. 67). The schools sharing in the parliamentary grant which are not "public" are almost invariably denominational, and are chiefly Roman Catholic and Episcopal. In England, they are termed "voluntary," and exist in much greater proportion than in Scotland, owing to the fact that in England "no religious catechism, or religious formulary which is distinctive of any particular denomination," can be taught in a board school. Accordingly in England, every denomination has striven to keep up its own schools. In Scotland, on the contrary, the school board may give such religious instruction as they choose: and therefore instruction in the doctrines of the Presbyterian Church is given almost without exception in board schools, and voluntary or denominational schools have become unnecessary, except in the case of Roman Catholics and Episcopalians. It is enacted that, in every school sharing in the parliamentary grant, Her Majesty's inspectors are not to examine in religious knowledge (s. 66), and the time devoted to religious instruction or observance must be at the beginning or end of school hours, so that the child may be absent if its parents so wish (s. 68).

#### VII. *School Board Finance.*

All moneys received by the school board, and not by the Act of 1872 or otherwise specially appropriated, are to be carried to a "school fund." The expenditure of the board is to be paid out of the school fund, and any deficiency in that fund is to be made good out of the rates (ss. 43, 44). The school board must, before the 12th of June in each year, certify to the parish council the amount of the said deficiency, and the parish council

must levy, in "the same manner" as the rate for relief of the poor, a school rate sufficient to yield the sum required to make up the said deficiency. Where a school district includes more than one parish, the school board must certify to the parish council of each parish the rate per pound required to be levied as school rate. In the few parishes where there is still no assessment for the poor, the school board must themselves levy the school rate. "The laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school rate" (s. 44). See RATING. But parish ministers are liable for school, though not for poor, rate, in respect of manse and glebe (*Hogg*, 1880, 7 R. 986; *Campbell*, 1884, 12 R. 309). A school board may borrow money, for the purpose of providing or enlarging a schoolhouse, either from the Public Works Loans Commissioners or from the public, on the security of the school fund and school rate (s. 45). An accountant is appointed by the Education Department (s. 50), and once in each year the treasurer of the school board has to transmit to him "an account showing the money receipts and payments of the board, and the state of the property under their charge," together with the vouchers, for audit. Any five ratepayers may demand inspection of such accounts and vouchers (s. 48).

#### VIII. *Grants from Imperial Revenue.*

1. The Parliamentary Grant.—A sum of money is annually voted by Parliament in aid of education in Scotland, and is distributed by the Education Department in accordance with conditions prescribed by them as to examination of scholars, etc., in the Scotch Education Code, which is published annually (s. 67). Inspectors appointed by Her Majesty inspect and report on any school claiming to share in this grant, and the amount received depends on this report; but the grant may not exceed 17s. 6d. per scholar in average attendance, except in so far as the income of the school from other sources exceeds that amount<sup>1</sup> (s. 19 of the English Elementary Education Act, 1870, which section applies to Scotland). This limitation of the parliamentary grant does not apply in the counties of Inverness, Argyll, Ross, Caithness, Sutherland, Orkney and Shetland, in parishes where a school rate of not less than 3d. per pound has been levied.

2. The Fee Grant.—Sums of (1) £40,000, (2) of about £265,000, and (3) "of the balance, if any, standing at the credit of the Local Taxation (Scotland) Account," are provided "towards relief from payment of school fees in State-aided schools in Scotland" (Local Taxation (Customs and Excise) Act, 1890, and Education and Local Taxation Account (Scotland) Act, 1892). These sums are to be distributed in accordance with conditions set forth in the Code. By the present Code, schools sharing in the fee grant must not charge for children between three and fifteen years of age. In practice, fees are not charged even below and above these ages. A school board may, with the sanction of the Department, maintain a school in which fees are charged.

3. The Secondary Education Grant.—The grant for secondary education (sometimes called the "equivalent grant") amounts to £60,000 per annum, and is distributed by the Education Department (s. 2, Education and Local Taxation Account (Scotland) Act, 1892). The Department have appointed committees, consisting of representatives of (1) the county council, and (2) the chairmen of all school boards in the county, to advise them as to the distribution of this grant.

<sup>1</sup> There is at present (February 1897) a proposal before Parliament to abolish the 17s. 6d. limit as regards voluntary schools in England.



4. The Technical Education Grant.—The grant for technical education (sometimes called the “residue” grant) may be devoted to that object by county and town councils, if they think proper. It is derived from an increased duty on spirits and beer, and amounts to about £48,000 per annum (s. 2, Local Taxation (Customs and Excise) Act, 1890).

#### IX. School Board Teachers.

1. Teachers appointed previous to 1872.—Such “old” teachers are not to be prejudiced by any of the provisions of the Act of 1872 with respect to terms of office, emoluments, or retiring allowance (s. 55). A parish (but not a burgh (*Mitchell*, 1883, 10 R. 982)) school teacher held office *ad vitam aut culpam*. He can therefore only be dismissed (*a*) if found guilty by the Sheriff of immorality, or cruelty, or improper treatment of his scholars, or (*b*) if the school board, after a report by H.M. inspector, consider him “incompetent, unfit, or inefficient” (s. 60). In the latter case he is entitled to the same retiring allowance as he would have had under ss. 19, 20, of the Parochial and Burgh Schoolmasters Act, 1861 (s. 60, Act of 1872). By the said Act of 1861 he was, and therefore is still, entitled to a retiring allowance of two-thirds of his salary, if not “in fault”; but, in the absence of any special contract with the school board, any share of grant or fees which he may have been receiving is not to be taken into account in determining the amount of his retiring allowance (*Goddie*, 1895, 23 R. 261). The school board should state their reasons for dismissal, so that the Court may judge whether the reasons given amount to “fault,” as, if not, the teacher is entitled to a retiring allowance (*Robb*, 1875, 2 R. 417). But if the reasons given are considered sufficient by the Court, they will accept the board’s decision as to facts, and will not order a proof, unless a relevant case of “oppression” be averred (*Morison*, 1875, 2 R. 715, and *Marshall*, 1879, 7 R. 359). There have been many disputes between teachers appointed previous to 1872 and school boards as regards emoluments (see Graham’s 9th ed. of Sellar’s *Manual*, pp. 253–282, for summary of such cases). A teacher is entitled to emoluments as large as he had in 1872; and if the school board, by new arrangements in the school, reduce them, he will be entitled to compensation (*Hunter*, 1875, 2 R. 520); but if his emoluments increase, *e.g.* in virtue of increase of fees or of parliamentary grant, he is not entitled as matter of right to such increase (*Douk*, 1884, 11 R. 719, and *Grant*, 1886, 13 R. 783). Where an agreement has been made since 1872 between the teacher and the school board regarding his remuneration, it is binding on both parties, though the result may be to increase the teacher’s emoluments (*Somers*, 1879, 7 R. 121, and *Smith*, 1891, 19 R. 247). Any “old” teacher whose remuneration is affected by the remission of school fees is entitled to compensation, to be decided by the Sheriff (s. 86, Local Government Act, 1889).

2. Teachers appointed subsequent to 1872.—Such teachers hold office “during the pleasure of the school board.” But they cannot be dismissed without three weeks’ notice that a proposal to dismiss is to be made at a board meeting, and the proposal must be carried by a majority of the whole board (Public Schools (Scotland) Teachers Act, 1882). A school board is not entitled to delegate its power of dismissal to managers (*Barvas*, 1891, 18 R. 647). After such resolution has been carried, the teacher is entitled to “reasonable” notice. In the absence of special agreement, three months has been held to be reasonable notice (*Hinds*, 1883, 10 R. 930). The Department issue certificates of competency to teachers in accordance with regulations made by the Department as to examination, etc. (ss. 57, 58).

The school board may grant a retiring allowance (s. 61). Teachers are entitled to be entered on the register of parliamentary voters as liferent proprietors notwithstanding that they hold office "during the pleasure" of the board (s. 24, Act of 1878, and *Murray*, 1878, 6 R. 26).

There is no peculiarity attaching to the tenure of office of a teacher not under a school board.

#### X. *Higher Class Public Schools.*

Burgh schools existing at the passing of the Act, in which the education given does not consist chiefly of elementary instruction, and eleven schools scheduled to the Act, are declared to be higher class schools. But any parish or burgh school board may resolve that a school under its management shall in future be deemed to be a higher class school (ss. 62, 63).

In such schools the revenue consists of contributions from the "common good" of burghs, endowments, and fees. (As regards "common good," see No. II. *Supply of School Accommodation*, and cases there quoted.) They may also share in the secondary education grant given under the Act of 1892. These funds are to be administered exclusively for the benefit of the school to which they belong. The teachers are paid by the fees, and their salaries are not to be defrayed out of the rates. But the school board may pay the interest and repayment of loans for building such schools, and for their maintenance, and other expenses, except teachers' salaries, out of the rates (s. 18, Act of 1878). In 1896 there were only thirty higher class public schools in Scotland. The school board regulate the examination of, and fix the standard of qualification of, teachers in such schools. Such schools do not receive any share of the parliamentary grant: for in any school sharing in such grant, "the education given must consist chiefly of elementary instruction" (Article VI. (c) of Code). But although in ordinary State-aided schools the education consists "chiefly" of elementary instruction, there are usually one or more schools under every school board where a considerable amount of secondary education is given, and therefore there is, as a rule, little to be gained by instituting a "higher class public school" under the Act.

#### XI. *Technical Schools.*

In 1887, the Technical Schools (Scotland) Act (50 & 51 Viet. c. 64) was passed "to facilitate the establishment of technical schools in Scotland"; but the Act has hardly been used, for the reason that school boards can, without making use of its provisions at all, obtain, as they had been in the habit of doing before the Act passed, grants for technical instruction in their ordinary schools from the Science and Art Department. A school board may therefore give technical instruction, and earn grants therefor, in any of its schools without having recourse to the procedure directed by the Act of 1887 for the establishment of a technical school, so that there is no advantage to be gained by adopting that course. By the Act of 1887, a school board may resolve to establish a technical school in its district, which resolution must be confirmed by the Education Department. The expenses of such a school are to be paid out of the school fund. Grants may be earned in it from the Science and Art, but not from the Education, Department. Only scholars who have passed the fifth standard are to be admitted to the school. By the Local Taxation (Customs and Excise) Act, 1890, a sum of about £48,000 is annually placed at the disposal of county and town councils for purposes of technical education, if so advised; and by the

Technical Instruction Amendment (Scotland) Act, 1892 (55 & 56 Vict. c. 63), it is provided that this money, if devoted to technical education, is to be applied in making provision for technical instruction accessible to the inhabitants of the district. Among other purposes, it may be applied in providing scholarships or bursaries, and in making contributions to schools (including public schools) or institutions within the district, for the promotion of technical education to scholars who have passed the fifth standard. Technical education means "instruction in the principles of science and art applicable to industries, and in the application of special branches of science and art to specific industries or employments." It also includes "instruction in the branches of science and art with respect to which grants are, for the time being, made by the Department of Science and Art." A sum of money is annually voted by Parliament for instruction in science and art, and is administered by that Department.

### XII. *Compulsory Education and Protection of Children.*

In the Education Acts, "Sheriff" includes Sheriff-Substitute. A "Court of summary jurisdiction" consists of a Sheriff sitting in his ordinary Court, or in any Circuit Small Debt Court, or one or more justices of the peace, or any magistrate of any Police Court (s. 3, Act of 1883). Every prosecution for penalties, or to obtain any order under the Education Acts, may take place before a Court of summary jurisdiction, whose decision on the facts shall be final, though subject to review under the Summary Prosecutions Appeals (Scotland) Act, 1875. Any person appointed by the school board may prosecute, and no expenses can be awarded against the prosecutor (s. 14, Act of 1883). Every parent or guardian is bound to provide for the education of his children, who are between five and fourteen years of age, in reading, writing, and arithmetic, but a certificate by Her Majesty's inspector that a child has passed the fifth standard in each of these subjects exempts from prosecution; and if the child has been prevented from attending school by sickness or any other unavoidable cause, or if there is no public or inspected school within three miles, the parent has a "reasonable excuse" for not complying with the provisions of the Acts (ss. 69-73, Act of 1872, and 4, 7, 11, Act of 1883).

If the parent of a blind or deaf-mute child, between five and sixteen, is from poverty unable to educate it, it is the duty of the school board to provide for its education and industrial training, and, if necessary, for its board, and the school board may obtain repayment of the expense from the school board of the parish in which the parent has his legal settlement (Education of Blind and Deaf-Mute Children Act, 1890). Every school board must appoint an officer to ascertain and report what parents in the parish or burgh are failing to educate their children. The school board are authorised to summon any defaulter before them. If he fail to appear, or, having appeared, to satisfy the school board, they are bound to certify in writing that he has been, without reasonable excuse, failing to provide elementary education for his child. This certificate is transmitted to the person appointed by the school board to prosecute (or to the Procurator-Fiscal), and, on conviction, the parent or guardian is liable to a fine not exceeding £1, or to fourteen days' imprisonment. A certificate by the school board is indispensable for prosecution under the Act of 1872 (*France*, 1887, 4 R. (J. C.) 42, and *Macaulay*, 1887, 14 R. (J. C.) 43). By the Act of 1883, and by the Day Industrial Schools (Scotland) Act, 1893, an alternative method of prosecution is provided. The course of procedure under the Act of 1872 is different from that directed by the Acts of 1883 and 1893.

and the school board may adopt one or other course, but must not attempt to combine them (s. 15, Act 1883, and opinions in *Macaulay*, 1887, 15 R. 99). If a complaint is brought under the Act of 1872, it is incompetent for the Court to pronounce an attendance order under the Act of 1883 (*M'Donald*, 1891, 19 R. (J. C.) 1). Under the said Acts of 1883 and 1893 a defaulter may, "after due warning," be brought before the Court on the complaint of the school board, and his child may be ordered to attend some public or inspected or day industrial school. If such attendance order is not complied with, the defaulter may again be brought before the Court. If he fails to appear, or, on appearing, to satisfy the Court that he has used all reasonable efforts to enforce compliance with the order, the Court may impose a penalty not exceeding £1, with expenses, or of imprisonment not exceeding fourteen days. If he does so satisfy the Court, the child may be sent to an industrial or day industrial school, and the Court may order the parent to contribute towards its maintenance. An attendance order may be enforced by a Court which did not grant it (*Lochwinnoch S. B.*, 1886, 13 R. (J. C.) 102). While a parent may be prosecuted for failing to educate his child, any person may also be prosecuted for employing children who ought to be at school. But a distinction is made between 1. regular and 2. casual employment.

1. No person is allowed to take into regular employment, except during hours during which the school is not open, or if there be no inspected school within three miles,

(1) A child under ten.

(2) A child between ten and fourteen, unless he has (*a*) passed the fifth standard, or (*b*) passed the third standard and is attending a public or inspected school in accordance with the provisions of sec. 23 of the Factory and Workshop Act, 1878, or of any minute of the Education Department fixing the number of attendances to be required of such children (ss. 5, 7, Education Act, 1878, and 5, Act of 1883). No child under the age of eleven can be employed in a factory or workshop, and no child under thirteen can be employed there full-time (Factory and Workshop Acts, 1878, 1891). No child under the age of twelve can be employed in mines, whether above or below ground (Metalliferous Mines Regulation Act, 1872, and Coal Mines Regulation Act, 1887).

2. Casual employment means "employment for purposes of gain in streets or other places in vending or exposing for sale any article whatsoever, and also employment of any other kind outside the child's own home, not being employment the lawful period whereof is regulated by any Act of Parliament." No child may (unless it has passed the fifth standard) engage in such employment later than 9 p.m. from 1st April to 1st October, or than 7 p.m. from 1st October to 1st April. But the school board may exempt any child from these restrictions for a period not exceeding six weeks in the year (s. 6, Act of 1878). By the Prevention of Cruelty to Children Act, 1894, certain restrictions are placed on the employment of children in places of public amusement, but it is provided that the school board may grant a licence for such time, and during such hours of the day, as it may think fit for any child exceeding seven years of age to be employed in such places, if satisfied of the fitness of the child for the purpose, and if proper provision has been made to secure its health and kind treatment. See CRUELTY TO CHILDREN.

A parent employing or permitting a child to be employed "in any labour exercised by way of trade, or for the purposes of gain," is an employer, and every employer contravening the Education Act, 1878, is

liable to a penalty not exceeding £2 (ss. 8, 9). It is the duty of inspectors acting under the Acts regulating factories, workshops, and mines, to enforce the provisions of these Acts and of the Education Acts against employers of children in such factories, workshops, and mines; while it is the duty of the school board to prosecute parents and those employers to whom the provisions of the Factory, Workshop, or Mines Acts do not apply (s. 10, Education Act, 1878).

### XIII. *Industrial and Reformatory Schools.*

By the Secretary for Scotland Act, 1887, all powers and duties hitherto vested in one of Her Majesty's Secretaries of State are, as regards Scotland, transferred to the Secretary for Scotland; but the powers and duties under the Industrial and Reformatory Schools Acts are specially excepted. The commissioners of supply (now the county council) or the magistrates of any burgh may resolve, with the approval of the Home Secretary, to contribute out of the county or municipal rates to any certified industrial or reformatory school (Prisons (Scotland) Act, 1877, s. 67). By the Reformatory and Industrial Schools Act, 1891 (54 & 55 Vict. c. 23), the managers of such schools may, with his own consent, apprentice any youthful offender or child detained therein to any trade or service, or dispose of him by emigration with the consent of the Home Secretary.

1. *Industrial and Day Industrial Schools.*—(1) Industrial schools are regulated by the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), and the Industrial Schools Acts Amendment Acts of 1880 and 1894 (43 & 44 Vict. c. 15, and 57 & 58 Vict. c. 33). By the said Act of 1866, which is the principal Act, an industrial school is defined as one "in which industrial training is provided, and in which children are lodged, clothed, and fed, as well as taught" (s. 5). One of Her Majesty's inspectors of prisons is to be appointed by the Home Secretary to inspect industrial and reformatory schools. After such inspection the Home Secretary may certify a school as a "certified industrial school," but no school can be certified as at the same time industrial and reformatory (s. 8). The following classes of children, if under the age of fourteen, may be sent to a certified industrial school: a child

"That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale any thing), or being in any street or public place for the purpose of so begging or receiving alms:

"That is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence:

"That is found destitute, either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment:

"That frequents the company of reputed thieves" (s. 14).

By the Industrial Schools Acts Amendment Act, 1880, a child that is residing with, or that frequents the company of, prostitutes, may be sent to an industrial school; and by the Prevention of Crimes Act, 1871, s. 14, the children of any woman convicted of crime and having a previous conviction against her, may, if they have no visible means of subsistence, and if they are without proper guardianship, be sent to an industrial school. By the Prevention of Cruelty to Children Act, 1894, s. 9, if a child under sixteen is brought before the Sheriff in circumstances authorising him to deal with the child under the Industrial Schools Acts, he may, in lieu of sending it to an industrial school, commit it to the custody of a relation or person named by the Court. Any two justices or a magistrate may, after inquiry, send a child falling under any of the above classes to an industrial school.

but not without giving notice to the parent or guardian (*Stirling*, 1874, 1 R. (J. C.) 8; *Mackenzie*, 1889, 16 R. (J. C.) 53). A child under twelve, charged with an offence punishable by imprisonment, and not previously convicted of theft, and also children under fourteen, if their guardians or the parish council show to the satisfaction of the Court that they are "refractory," or if their parents have been convicted of crime, may be sent to an industrial school (ss. 15-17, Act of 1866). The order for detention shall specify the period during which the child is to be detained, but such period must not exceed the time when the child shall attain the age of sixteen. The reception of the child by the managers of the school shall be deemed to be an undertaking by them to provide for the child during his detention. The Court shall, if possible, select a school conducted in accordance with the child's religious persuasion (s. 18). The managers may, after eighteen months, grant a licence to a child to live out of the school with some respectable person (s. 27). By the Industrial Schools Acts Amendment Act, 1894, a child sent to an industrial school remains "under the supervision" of the managers up to the age of eighteen. The managers may grant a licence to such child, under sec. 27 of the Act of 1866, to live out of school, but may recall such licence if necessary for the protection of the child. A child above ten, refusing to conform to rules or escaping from school, may be prosecuted before a Court, and is liable to be sent to prison and to a reformatory (ss. 32, 33, Act of 1866). Any person assisting a child to escape from an industrial school may be prosecuted (s. 34, and Act of 1894). The Treasury and parish councils are empowered to contribute to the maintenance of children in industrial schools, and the parish council of the parish in which the child has a settlement is liable to repay the cost of maintenance, not exceeding five shillings per week, to the Treasury (ss. 35-38). The parent or guardian is liable to contribute a sum not exceeding five shillings per week for the support of the child in an industrial school, and this liability may be enforced by the inspector of industrial schools (ss. 39, 40). The Home Secretary may at any time order any child to be discharged from an industrial school, and may, if dissatisfied with the condition of such a school, withdraw his certificate from it (ss. 43, 44). A house of refuge or other similar institution (*e.g.* a training-ship) may be certified as an industrial school (s. 49). Forms of conviction, orders for detention, and on parents to contribute, etc., are given in schedules to the Act.

(2) *Day Industrial Schools*.—By the Day Industrial Schools Act, 1893, the Home Secretary may grant a certificate to a school "in which industrial training, elementary education, and one or more meals a day, but not lodging, are provided for the children." A school board is entitled, with the consent of the Home Secretary, to establish and maintain either an industrial or a day industrial school, or may contribute to the establishment and maintenance of such a school and to the support of its inmates (s. 41, Act of 1872, and ss. 3, 7, Act of 1893). County and town councils may also contribute to such schools. Any child authorised by the Industrial Schools Act, 1866, to be sent to an industrial, may now be sent to a day industrial, school, and the Court may order the parent of such child to contribute to its support, and the school board may enforce such order (s. 3). If a child does not comply with an attendance order, it may be sent to an industrial, or day industrial, school (s. 4).

2. *Reformatory Schools*.—These schools are regulated by the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), and the Reformatory Schools Act, 1893 (56 & 57 Vict. c. 48).

By the said Act of 1866, the managers of any reformatory school for the better training of youthful offenders "may apply to a Secretary of State, who may certify that such school is fitted for the reception of such youthful offenders as may be sent there in pursuance of this Act, and the same shall be deemed a certified reformatory school." The managers may decline to receive any offender proposed to be sent to them, but, having received him, they are deemed to have undertaken to educate and support him during the whole period for which he is liable to be detained in the school (ss. 4-8). The school to which the offender is to be sent may either be named by the Court which sentences him, or by any visiting justice of the prison to which he is committed (s. 14). After eighteen months have elapsed, the managers may allow an offender out on licence. If he has behaved well while out on licence, he may be apprenticed by the managers, though his period of detention has not expired. Any offender attempting to escape, or refusing to conform to rules, may be prosecuted and punished (ss. 18-22). The expense of conveying an offender to any such school, and of supplying proper clothing for his admission, is to be defrayed by the prison authority within whose district he was last imprisoned. The Treasury may contribute to the maintenance of such offender, but the parent or person legally liable to maintain him shall, if of sufficient ability, contribute for his support not more than five shillings per week, and, on the complaint of the inspector of Reformatories, any magistrate where the parent resides may enforce such obligation (s. 25). Any prison authority may contract with the managers of any certified reformatory for the reception and maintenance therein of offenders whose detention in such a school is directed by a Court or magistrate acting within the district of the prison authority (s. 27). A house of refuge or other similar institution may be certified as a reformatory (s. 31). Forms of conviction, orders of detention, etc., are given in schedules to the Act. The said Act of 1893 defines those who may be sent to a reformatory as follows:—

"1. Where a youthful offender, who in the opinion of the Court before whom he is charged is less than sixteen years of age, is convicted, whether on indictment or by a Court of summary jurisdiction, of an offence punishable with penal servitude or imprisonment, and either (*a*) appears to the Court to be not less than twelve years of age; or (*b*) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment, the Court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period of not less than three and not more than five years, so, however, that the period is such as will in the opinion of the Court expire at or before the time at which the offender will attain the age of nineteen years."

By the same Act the Court are empowered to send the offender to prison or other place which they think fit, to be detained for any period not exceeding seven, or, in case of necessity, fourteen days, or until an order is sooner made for his discharge or for his being sent to a reformatory.

#### XIV. *Educational Endowments.*

See EDUCATIONAL ENDOWMENTS ACT, 1882.

#### XV. *Miscellaneous.*

The following cases, decided on the question of award of bursaries, may be referred to: *M'Quaker*, 1891, 18 R. 521; *M'Donald*, 1890, 17 R. 951; *Martin's Trust*, 1885, 13 R. 274; *Ramsay*, 1860, 22 D. 1328; affd. 1861, 23

D. (H. L.) 8. For a case in which it was held that the authorities of an educational establishment were not entitled in the circumstances to dismiss students for insubordination, see *Cudells*, 1890, 17 R. 1138. A professor in a University is entitled to interdict the publication of his lectures without his sanction (*Caird*, 1887, 14 R. (H. L.) 37). See UNIVERSITY.

[Graham's 9th ed. of Sellar's *Manual of Acts Relating to Education in Scotland*.]

**Educational Endowments Act, 1882** (45 & 46 Vict. c. 59).—The purpose of this Act, as set forth in its preamble, was “to extend the usefulness of educational endowments in Scotland, and to carry out more fully than is done at present the spirit of the founder's intentions, and, so far as may be, to make an adequate portion of such endowments available for affording to boys and girls of promise opportunities for obtaining higher education of the kind best suited to aid their advancement in life.” Educational endowments are defined in sec. 1 as “any property, heritable or moveable, dedicated to charitable uses, and which has been applied, or is applicable, in whole or in part, whether by the declared intention of the founder, or the consent of the governing body, or by custom or otherwise, to educational purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society, contributed or paid by the members of such incorporation or society by way of entry moneys or other fixed or stated payments, nor burgess fines paid to any such incorporation or corporate society, except as hereinafter provided.”

The Act provided for the appointment of seven Commissioners, and gave them power to prepare drafts of schemes for the future government and management of educational endowments, “which schemes may provide for altering the conditions and provisions of such endowments, including the powers of investing the funds thereof, or amalgamating, combining, or dividing such endowments, or altering the constitution of the governing bodies thereof, or uniting two or more existing governing bodies” (ss. 4, 5). The Commissioners were directed to have special regard to making provision for secondary, or higher, or technical education in public schools or otherwise in the localities to which the endowments belonged, and they were empowered to provide for establishing or aiding industrial museums or libraries (s. 7). The Act did not apply to any gift made subsequent to the passing of the Education Act of 1872 (35 & 36 Vict. c. 62), nor to any endowment belonging to, or administered by, or in gift of any of the Scottish Universities or their colleges, or to any endowment solely or mainly applicable or applied for purposes of theological instruction, or belonging to any theological institution, without the consent in writing of the founder or the governing body of such endowment, or the *Senatus Academicus* of such University (s. 8).

In framing schemes, the Commissioners were directed to have regard to the spirit of the founder's intentions, and to have regard to the interests of any class whom the founder intended to benefit (s. 15); and they were also empowered to provide for the alteration of a scheme from time to time by the Court of Session, upon an application made, with the consent of the Scottish Education Department, by the governing body or by any party interested (s. 20) (*Dollar Institution*, 1890, 18 R. 174; *Logan and Johnston School*, 1890, 18 R. 190; *Philp's Trust*, 1893, 30 S. L. R. 790; *Jonathan Anderson's Trust*, 1896, 23 R. 592; *Bell's Trust*, 1896, 23 R. 780).



Provision was made for the submission of the draft schemes to the Scottish Education Department, whose approval was to be final, unless a case was timeously presented to the Court of Session by someone interested (ss. 25, 26, 30, 31).

The following cases as to endowments which did or did not fall within the scope of the Act may be referred to: *Forrest's Trs.*, 1884, 11 R. 719; *Donaldson's Hospital*, 1885, 13 R. 101; *Ferguson Bequest Fund*, 1887, 14 R. 624, 717; *Magistrates of Greenock*, 1888, 15 R. 440. See also *Glasgow General Education Endowments Board*, 1886, 23 S. L. R. 765.

By the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, s. 30), it is provided that property held by trustees for the benefit of the inhabitants of a parish may be transferred to the parish council, or to persons appointed by the parish council. An exception is made, however, in several cases; amongst them being the case of "educational endowments" within the meaning of the Act of 1882. See EDUCATION.

**Egyptians.**—In almost every nation in mediæval Europe severe enactments were passed against Egyptians or gipsies. The habits of these Oriental wanderers were lawless and demoralising. France, Germany, England, and Spain enacted laws which ordained that Egyptians should be banished from these countries. Following the example set by these nations, the Scottish Privy Council in 1603 made an order that the whole race of Egyptians should quit Scotland by a certain day and never return, under pain of death. This order was made a perpetual law by the Act 1609, c. 13, and numerous trials and capital convictions subsequently took place under the Act. At first, the mere fact of a man being an Egyptian led to his conviction of a capital crime: afterwards the Court required, in addition to proof of this fact, evidence that the accused had actually committed a theft or other crime.—[Hume, i. 471; Ersk. iv. 4. 64.]

**Eik to a Confirmation.**—It is the duty of an executor, when he applies for confirmation, to give up an inventory of the moveable estate belonging to the deceased. It frequently happens that, after he has obtained confirmation, he discovers some additional part of the deceased's estate, which, through ignorance of its existence, he has omitted to include in the inventory. In such circumstances he must eik to his confirmation the additional estate discovered (4 Geo. IV. c. 98, s. 3). This is done by lodging with the Commissary Clerk, within two months of the discovery, an additional inventory of the estate discovered, stating on oath the fact of the discovery, and that the additional inventory contains the whole of the estate discovered. More than one eik may be made if necessary. Where the executor has under-estimated the value of any portion of the estate contained in his inventory, the surplus value appears to be in the same position as a part of the estate entirely omitted from the inventory (*Smith's Trs.*, 1862, 24 D. 1142), and the executor should make an eik to his confirmation to that extent. If, however, he has succeeded in obtaining possession of the asset, in spite of the under-estimate of its value, his title to it is good.

See CONFIRMATION OF EXECUTORS: AD OMISSA VEL MALE APPRETIATA: INVENTORY.

**Eik to a Reversion.**—See WADSET.

**Ejection.**—This term, as used in Scots law, denotes both a substantive process of law, and the purely accessory proceeding for the execution of certain decrees.

(1) Ejection in the former sense is frequently used as equivalent to the summary removing of a tenant. See REMOVING. But the term is more strictly applicable to the process appropriate for the removing of persons whose possession or occupancy is either vitious or precarious, *i.e.* is held *vi, clam aut precario*, as having been obtained by force or fraud, or as resting on mere tolerance. In this sense a process of ejection is not a proper method of trying a question of right to possession. Its form is a petition to the Sheriff Court, without warning, for a summary warrant to eject the defender and his effects from the premises. The procedure is the same as in a removing, except that no charge is necessary on the decree. And it has recently been held that a summary decree of ejection, unlike a decree of removing, may competently be brought under review by way of appeal to the Court of Session (*Robb*, 1895, 22 R. 885).

This process of summary ejection is available against the following: (a) The heir of a liferent tenant, subject, however, to his rights under the rule *messis sementem sequitur*; (b) a squatter, occupying without any title; (c) an employee whose occupancy of the premises is incidental to his employment, on the termination of his employment; (d) a seller of lands who refuses to give up possession to the purchaser; (e) a tenant, not as definitively terminating his right to possess, but as suspending it until fulfilment of an obligation to stock or furnish in implement of a decree (*Macdonald*, 1888, 16 R. 168). (f) A new case is introduced by the Heritable Securities Act, 1894 (57 & 58 Viet. c. 44), s. 5, which provides that where the debtor under a bond and disposition in security is in personal occupation of the lands disposed in security, or of any part of them, and has made default in the punctual payment of interest, or in the due payment of the principal after formal requisition, the creditor, if he desires to enter into possession, may take proceedings to eject him, as an occupant without title.—[See Hunter, *Landlord and Tenant*, 4th ed., ii. 101 f.; Rankine, *Leases*, 2nd ed., 526–30; Lees, *Sheriff Court Styles*, 3rd ed., 169.]

(2) The term ejection is also applied to the accessory procedure by which a decree in a removing or other process is executed, where the occupant delays or refuses to quit the possession of the subjects. Ejection in this sense may proceed upon letters of ejection, issued after the execution and registration of a charge on the decree. These letters, passing under the Signet, are directed to the Sheriff of the county, and require him to eject the occupant, and to put the holder of the decree in possession. This procedure, which is competent where the decree of removing is pronounced in the Court of Session (*i.e.* where the decree is ancillary to a reduction or declarator), is now rarely employed. More commonly the Sheriff Court is resorted to. Here ejection proceeds upon an extract decree containing an order upon the defender to remove, with a warrant to officers of Court to eject him failing his removal after a forty-eight hours' charge. Where, however, the process is brought merely to enforce a decree already pronounced, or where, as in the cases of summary ejection above mentioned, a decree of removing is unnecessary, the extract warrant *de plano* authorises the officers summarily to eject the defender. Abbreviated forms of these warrants, having the force and effect of the longer forms previously in use, are provided by the Sheriff Courts (Scotland) Extracts Act, 1892 (55 & 56 Viet. c. 17), s. 7, Scheds. 9 and 10. The judge, even where the pursuer

demands immediate ejection, may at his discretion allow a short period before execution of the warrant.

Ejection must be carried out timeously. If not, and especially if *rei interventus* has followed, it may be held to have been departed from. But it has been held in a recent case that it was not sufficient to produce this result, that a charge on a decree of removing was not executed until three weeks after the term at which the tenant was ordered to remove (*Taylor*, 1892, 19 R. 399). Ejection cannot lawfully be carried out during the night. The limits of night and day do not necessarily coincide with sunrise and sunset. The question is one of circumstances, for the determination of a jury. Illegal ejection gives rise to an action of damages, and so also does the obtaining of an illegal warrant to eject, though the warrant has not been executed. The pursuer of a claim of damages for wrongous ejection must show that he had a legal title to continue in the premises (*Macdonald*, 1883, 10 R. 1079).—[See Rankine, *Leases*, 2nd ed., 515–20; Ersk. iv. iii. 17; Hunter, *Landlord and Tenant*, 4th ed., ii. 99; *Juridical Styles*, iii. 377].

**Ejection and Intrusion.**—Ejection is the unwarrantable entry into possession of lands or other heritage by the violent expulsion of the person then in natural possession. Intrusion is such unwarrantable entry, when the natural possession is for the time void, the possessor holding only *animo*. Both imply entry into the natural possession, or at least deprivation of a tenant. It is not enough that a tenant should invert his landlord's possession and pay his rent to another.

These wrongs give rise to actions of ejection and intrusion, corresponding to the action of *spuilzie*, which arises from dispossession of moveables. The two actions are regulated by similar rules. They may be brought both for the recovery of possession of the subjects, and for "violent profits," which are penal damages imposed to prevent the illegal taking or keeping of possession. See VIOLENT PROFITS. Both actions are founded on possession. The pursuer is required only to show that he was in lawful possession, and need set forth no title, excepting, apparently, where the ejector himself produces a heritable title to the subjects. The rule applied is, *spoliatus ante omnia restitendus*. The pursuer must have been in the natural possession by himself or his servants,—at the time of the alleged dispossession in the case of ejection, and until shortly before it in the case of intrusion. Where a tenant has been unlawfully dispossessed, he, and not the landlord, is the proper pursuer, and the landlord cannot, without the tenant's consent, sue for violent profits or for anything more than the recovery of possession and for such damages as he may himself have suffered.

The defender can meet the action by showing (1) that he has relinquished the possession and made immediate restoration of the subjects in the same condition as before, with payment of expenses and the damages sustained; or (2) that his entry on the subjects was authorised by a warrant from a competent judge; or (3) that he entered with consent of the pursuer or of those who were in lawful possession. A warrant to enter into possession summarily contained in a disposition is a sufficient answer to an action of intrusion (such a warrant being regarded as a relinquishment of possession); but it is no answer to an action of ejection where the ejection has been resisted. The defender, unless he is prepared instantly to verify a defence which excludes the action, must, as a condition of lodging defences, find

caution for the payment of violent profits if they should be awarded against him (1594, c. 217; A. S. 10 July 1839, pt. i. 34).

Actions of ejection and intrusion are subject to the short negative prescription of three years introduced by the Act 1579, c. 81. This Statute has, however, been so applied as only to limit to three years the pursuer's right to violent profits, and to a proof by his own oath *in litem*. The limitation does not cut off the right to sue for restitution and ordinary damages; and as the oath *in litem* is now in desuetude, the only effect of the limitation is to save the defender from liability for the excess of violent profits over ordinary damages. Actions of ejection and intrusion are now, in practice, almost entirely superseded by summary petitions for removing or ejection, in which, however, the liability for violent profits is unaffected.

[See Stair, i. 9. 25, iv. 28; Ersk. iv. 1. 15; Hunter, *Landlord and Tenant*, 4th ed., ii. 196; Rankine, *Landownership*, 19 f.; Lees, *Sheriff Court Styles*, 3rd ed., 171.]

**Election, or Approbate and Reprobate.**—The fundamental principle of the equitable doctrine of approbate and reprobate in Scotland, and of that of election in England, is that “no person can accept and reject the same instrument” (*Kers*, 1819, 1 Bligh 1, per Ld. Eldon, at p. 21.)

The Scots doctrine of approbate and reprobate is not a mere adaptation of the English doctrine of election (*Nisbet*, 1851, 14 D. 145). But the two are merely different aspects of the same principle, and they are now recognised as both producing the same result (*Macfarlane*, 1882, 9 R. 1138), and the old Scots term has, in recent cases, practically given place to the English expression “election,” which is now almost exclusively used.

Two sets of circumstances may call for the application of the doctrine which it designates.

*First*, a testator may dispose of that which is another's, in which case the *legatum rei alienæ* is ineffectual without the consent of that other.

*Second*, he may dispose, though ineptly, of that which is his own, in which case the right of his heir is unaffected in law by the bequest.

But if the settlement confers benefit upon the owner of the *res aliena*, or upon the heir, and that benefit is conferred upon the condition, either expressed or implied, that the *legatum rei alienæ*, or the inept bequest, as the case may be, is to secure effect, then the owner of the *res aliena*, or the heir, if he accepts the benefit conferred on him by the settlement, must satisfy the condition on which it is conferred, and allow his own property, or the testator's bequest, though inept, to pass as the testator directed,—in other words, must allow the testator's testamentary intention, as a whole, to be carried out, else he will be found to accept and reject the same instrument, which equity forbids. “It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift” (per Ld. Eldon in *Kers*, *ut supra*).

1. *Circumstances in which the Doctrine of Election applies.*

*First*.—A testator may dispose of that which is another's. A *legatum rei alienæ*, in the popular sense, rarely occurs; but where a beneficiary under a testator's settlement has, in his own right, and independently of that settlement, a *jus crediti* against the testator's estate, if the testator attempt to dispose of the subject-matter of that *jus crediti* he is truly disposing of a *res aliena*, and the principle of election steps in.

Thus, an heir of a marriage, having a *jus crediti* under the marriage

contract, may be put to his election by a subsequent settlement of the parent, derogating from his rights under the marriage contract (*Harveys*, 1860, 22 D. 1310; *Darling*, 1869, 41 Jur. 545; *Earl of Glasgow*, 1872, 11 M. 218; *Bonhotes*, 1885 12 R. 984).

So the question has arisen, where an entail embraced some lands to which the entailer had a valid title, and some to which his title was defective or incomplete (Sandford on *Entails*, pp. 183–197).

Prior to 1874, although an heir apparent transmitted nothing (*Clydesdale*, 1726, M. 1275), an entailer who possessed lands on apparency and others on a completed title, could validly entail both, the institute, if heir *alioqui successurus*, being barred by election from taking under the entail those estates to which the granter's title was complete without bringing under the entail the lands to which the granter's title was personal (*Carmichael*, 15 Nov. 1810, F. C.; *Murray*, 17 Jan. 1811, F. C.; *Smith*, 9 Dec. 1814, F. C.). Now, however, by the operation of the Conveyancing Act of 1874 (37 & 38 Vict. c. 94), s. 40, an heir on apparency can validly execute an entail, as he is put in exactly the same position as a disponent possessing on a personal title under an unfeudalised conveyance, who could always validly do so (*Napier*, 1762, 5 Bro. Supp. 888; *Fogo*, 1842, 4 D. 1063, and 1843, 2 Bell's App. 195).

Instead of embracing lands to which the entailer's title is personal, the entail may embrace lands to which his title may be otherwise defective, or which may be simply *res aliena*. Where such lands belong to the institute by independent title, the condition, if not express, may be implied, that he must bring them under the entail, if he is to enjoy those belonging to the granter. But if they do not belong to the institute himself, while he may be expressly compelled to acquire them, he will not be so by implication, as such a condition will not be presumed (*Arbuthnot*, 1792, M. 620, Bell's Oct. Ca. 161; *Douglas*, 1862, 22 D. 1191).

Again, the question may arise where one who has had conferred on him by *inter vivos* delivered deed, an absolute right, receives a subsequent *mortis causa* provision from the donor with condition attached (*Johnston*, 1873, 16 S. L. R. 271); and a wife has been found bound to make election by a document under her own hand, which yet she was entitled to revoke on the ground of donation *inter vir. et ux.* (*Campbell*, 1865, 3 M. 360).

But the most common example of this application of the doctrine is where the beneficiary is vested in his or her own right, with the legal rights of legitim or *jus relicte* against the estate of the testator. If, in such case, the parent or husband, while benefiting *aliunde* the child or wife who is the creditor of his estate in respect of this right, dispose of the subject-matter of that right, a case of election at once arises (cf. *Macfarlane*, *ut supra*).

*Second.*—A testator may make an inept or invalid bequest of that which is his own. Under this head fall (1) the case of deeds challengeable *ex capite lecti* (*Turnbull*, 1776, 5 Bro. Supp. 388), and (2) the case of bequests of heritage in terms inhabile to carry it (*Pringle*, 1671, M. 6374; *Cunningham*, 1758, M. 617, and see 1 Bligh, 27; *McAlister*, 1827, 5 S. 862). But since the passing of the Act of 1871 (34 & 35 Vict. c. 81), abolishing reduction *ex capite lecti*, and of the Titles to Land Act, 1868 (31 & 32 Vict. c. 101, s. 20), these cases are not likely again to occur in practice, and are valuable merely as analogies.

2. *The Intention to put to Election must be Clear.*—As the application of the doctrine of election depends upon the fact of there being attached to a gift the condition that something else shall be renounced by the donee, and

as that fact again depends on the intention of the donor, such intention must either be expressed or clearly and unequivocally implied. Mere conjecture is not sufficient (cf. *Ld. Chan. Lyndhurst in Trotter*, 1829, 3 W. & S. at 416). Hence election is no answer to a plea of fraud and circumvention alleged against part of a mutual settlement, because *ex hypothesi* the granter had no intention one way or the other (*Dow*, 1856, 18 D. 820). Nor, it is thought, can it be pleaded on a deed vitiated *in essentialibus* (*Robertson*, 1844, 7 D. 236, where *Ld. Fullerton's* reasoning is to be preferred to that of *Ld. Pres. Boyle* and *Ld. Mackenzie*).

3. *Subject to be renounced and Consideration for renunciation must be inseparably linked together.*—To raise a question of election, the subject to be renounced and the consideration for the renunciation must be linked together in such a way as to be inseparable. It does not matter that the settlement itself is contained in two or more deeds, provided they are *partes ejusdem negotii*, and made with reference to one another (*Stewart*, 1832, 11 S. 139; *Breadalbane*, 1840, 2 D. 731; *Black*, 1841, 3 D. 522). Where, however, they are not *partes ejusdem negotii*, and have no common purpose or object, even although they may bear reference one to another, they do not raise the plea (*Hill*, 4 May 1818, F. C., and *Hume*, 27; *Dow*, 1856, 18 D. 828; and cf. *Wilson*, 1802, 4 Pat. 316, reversing 1797, M. 15444, and *Urquhart*, 1851, 13 D. 742). This well recognised principle formed the ground of judgment in the important case of *Macdonald of Dalchossie*, 1876, 4 R. 45, where the question arose whether, under the circumstances, an heir of entail, who had been appointed to a sum of £25,000 of his parents' marriage-contract fund, was bound either to apply it in paying off the burden affecting estates entailed upon him by separate deed by his father, or forfeit his right as institute. The Court held that no such intention could be deduced from the deeds, two things being dealt with, but not so in combination as to give rise to election. While such was the ground of judgment, there is considerable doubt whether it was correctly applied. The fact that while Dalchossie was beyond the father's control, Lochgarry and Kinloch Rannoch were held by him in fee-simple, was somewhat lost sight of, and the pursuer was hampered by the form of the action, which was one for declarator of forfeiture only. The principle, to be afterwards explained, of equitable compensation, as distinguished from forfeiture, had hardly as yet been recognised in Scotland, and did not enter into the argument. The case rather appears to have been precisely one for the application of that principle; and special reference should be made to the opinion of *L. J. C. Moncreiff*.

4. *Donee must be free to Approbate or Reprobate cum effectu.*—The idea of election implies a choice, with a power of rejection or acceptance. A donee is not put to election, and cannot be said to reprobate where he is not free to approbate, or cannot approbate *cum effectu*. As, for instance, where the *res aliena* which the testator proposes to deal with is not the absolute property of the object of his bounty, but is held by him subject to fetters or conditions beyond his power to alter (*Douglas*, 1859, 21 D. 1066; and 1862, 24 D. 1191; cf. *Urquhart*, 13 D. 742, and *Bell, Com.*, 5th ed., i. 148).

5. *General Rules of International Law applicable.*—To questions of election involving a conflict of laws, the following general principles of international law apply: 1st, the law of the domicile determines the construction of the settlement; 2nd, the *lex rei sitæ* determines the quality of the subject; and 3rd, the same law determines whether the will operates as a conveyance of real or heritable property.

Thus, where a Scotchman left a foreign will, disposing *inter alia* of a Scotch heritable bond, the Scotch Courts determined (1) that the will was ineffectual to carry it; but (2) that the testator's intention was to convey it, and therefore that the heir-at-law, taking the heritable bond at *ab intestato*, was barred by election from taking under the will (*Loudon*, 1811, Hume, 23; cf. *Dundas*, 1829, 7 S. 241; and 1830, 4 W. & S. 460; *Alexander*, 1829, 7 S. 817). But where an Englishman left an English will disposing of Scotch heritage, while the Scotch law determined that the deed did not operate as a conveyance, it was for the English law to determine the intention. A reference to that law determined that the testator did not intend to convey the heritage, and therefore that the heir was not put to election (*Robertson*, 16 Feb. 1816, F. C.; cf. *Trotter*, 1826, 5 S. 78 (N. E. 72): 1829, 3 W. & S. 407; *Murray*, 1828, 6 S. 690; *Campbell*, 1836, 15 S. 310).

6. *When must Election be made.*—This question usually arises in cases where legitim is involved, but it is not necessarily confined to that case. When the party put to election is *sui juris*, election must be made after such reasonable interval as is necessary for fairly ascertaining the relative value of the subjects of choice, at least where the interest of others is in any way affected by the election.

Delay, to admit of the purifying of contingencies affecting one or other of the subjects of choice, will not be allowed (*Keith*, 1857, 19 D. 1040). But where the party put to his election is not *sui juris*, his curator or other guardian is neither entitled nor bound to elect for him (*Morton*, 11 Feb. 1813, F. C.; *Paterson*, 1866, 4 M. 706; *Morison*, 1880, 8 R. 205). It has been laid down that where the interest of other parties requires election to be made by the curator, it can only be done under the control of the Court, but that the Court will undertake the duty of control (per Ld. Chan. Cottenham in *Cowan*, 1848, 6 Bell's App. at p. 238). No case, however, has occurred in Scotland where the Court has found it necessary to interfere to direct election to be made (cf. *Robertson*, 1841, 3 D. 345). Where an heir of entail, succeeding to an entailed estate, is barred by the entail from holding it along with other estates already in his possession, he must elect between the two at once, and cannot make up a title to the entailed estate and disentail before electing (*Home*, 1876, 3 R. 591). An election made in ignorance of the party's legal rights, or in circumstances that do not admit of deliberation, may be recalled (*Johuston*, 1825, 4 S. 234, N. E. 237; *Hope*, 1833, 12 S. 222; *Selkirk*, 1854, 16 D. 715; *Lowson*, 1854, 16 D. 1098). But one who has taken his rights at law, or under a deed, in ignorance of the existence of a settlement or part of a settlement which puts him to election, is only entitled to make his election if he restores the benefit already taken (*E. of Glasgow*, 1872, 11 M. 218). Where a beneficiary who is put to election dies without electing, it is open to his representatives to elect in his stead (*Cowan*, *ut supra*; *E. of Glasgow*, *ut supra*; *Paterson*, 1866, 4 M. 706). Analogous to the question of election by curators and representatives, is that of election by a trustee in bankruptcy. The trustee is free to elect legitim in preference to testamentary provisions from which creditors are excluded, notwithstanding the bankrupt's opposition (*Aikman (Smith's Trustee)*, 1893, 30 S. L. R. 804).

7. *Effect of Election.*—Where a bequest is made subject to the condition that the beneficiary allows that which is his, independently of the settlement, to be disposed of as the testator directs, the beneficiary's refusal to comply with the condition necessarily disturbs the scheme of the testator's settlement, and disappoints an object of the testator's testamentary bounty. The consequence, in law, would be that the forfeited bequest would fall into

residue or intestacy, and the intended donee of the *res aliena* take nothing.

The consequence, however, in equity, is merely that compensation must be made out of the conditional bequest to him who suffers by the non-compliance with the condition. Upon the primary doctrine of election this equity of compensation has been engrafted (Ld. Chan. Eldon in *Kers*, 1819, 1 Bligh, at p. 15).

But how is this compensation to be made? Is the forfeited bequest to be given in its entirety to him who is disappointed, as a *surrogatum*, independently of comparative amounts, or is a mere equivalent for that of which he is deprived to be given him out of the conditional bequest, by way of equitable compensation; and if so, what is to become of the balance?

The answer to this threefold question is to be sought in the result which most nearly meets the intention of the testator.

In the *first* place, a distinction must be drawn between (1) the case in which the party electing to reprobate is put to his election *per expressum*, and (2) the case in which he is put to election by implication merely.

Where he is put to election *per expressum*, either by a clause declaring that repudiation shall involve forfeiture, or by a declaration that the provision under the settlement is in lieu or satisfaction of his independent claim, in such case the testator himself has annexed the consequence of forfeiture to the reprobatory act. But where he is put to his election merely by implication, absolute forfeiture is not necessarily the consequence of the reprobatory act. *Ex hypothesi* there is an implied condition arising from the terms of the settlement, that the beneficiary cannot claim both his provision under the settlement and vindicate his right independently of the settlement; but the important question is, What is the nature and extent of this implied condition? The reason why the law implies the condition is that without it the intention of the testator cannot be carried into practical effect. But the implication must not be carried beyond the reason and necessity. From the relative values of the subjects of election, practical forfeiture may result from the application of the doctrine. But if, a claim reprobatory of the will having been made and sustained, the result of the subsequent administration of the testamentary estate be in the end to make a division of the estate possible, substantially though not in form identical with what the testator designed, then to carry the implication the length of absolute forfeiture, would be to go quite beyond the reason of the implication. "This, I think, is the true foundation of the doctrine of equitable compensation (a doctrine now established in the law of Scotland), which is not merely something short of forfeiture, but something entirely different in principle" (per Ld. Pres. Inglis in *Macfarlane's Trs.*, 9 R. at p. 1167).

Hence (1) where election is *per expressum*, election to reprobate involves absolute forfeiture of the conditional bequest. But it is no part of the testator's intention to give in any circumstances to the party damaged by the election more than he could have taken had the settlement received full effect. If then, short of giving the forfeited bequest as a *surrogatum*, full compensation can be made, there is no reason why the balance should go to the party to be compensated, rather than to the residuary legatee or heir *ab intestato*.

But (2) where election is by implication, election to reprobate does not, in theory at least, involve forfeiture; but merely such a readjustment as will enable the testator's intention substantially, though not in form, to receive effect. When, therefore, in *point of amount*, there is deficiency in



the repudiated bequest, equitable compensation practically requires forfeiture, and gives merely a *surrogatum pro tanto*; but where circumstances admit of full compensation being made, then, when full compensation is made the intention of the testator is fulfilled, and it would not be in accordance with, but contrary to, the intention of the testator to withdraw further from the conditional bequest. The condition is purified, not as the testator intended, but by an equitable equivalent. Compensation is made and equity is satisfied. The testator has not imposed the condition of forfeiture, therefore the settlement takes its course as though from the first it had not been interfered with.

The doctrine of equitable compensation was only fully recognised in the recent case of *Macfarlane's Trs.*, 1882, 9 R. 1138, but its development can be traced in the following leading cases: *Kers v. Wauchope*, 1819, 1 Bligh, 1; *McJames*, 1827, 5 S. 862 (N. E. 801); *Peat*, 1839, 1 D. 508; *Breadalbane*, 1841, 3 D. 357; *Nisbet*, 1851, 14 D. 145; *Krith*, 1857, 19 D. 1040; *Harey*, 1862, 1 M. 245; *Davidson*, 1871, 9 M. 995; *Johnston*, 1875, 2 R. 985; *Macdonald of Dalchousie*, 1876, 4 R. 45.

8. *How is Election to be enforced?*—The mode in which election will be enforced depends upon the relative position of the party stating the plea, and the party against whom it is stated, towards the subjects between which election is sought to be enforced. It also depends upon whether the result of election to reprobate is to be forfeiture or merely equitable compensation. But in one mode or another the Court, as a Court of equity, will interfere to enforce election when the plea is well founded.

When the party against whom the plea is stated has to vindicate his claim both to the subject to be renounced and to that which *ex hypothesi* is the consideration for the renunciation, or, being in possession of the former, has to vindicate his right to the latter, he may be put to his election *ope exceptionis* or by way of defence. If he elects to retain what is his own, he either forfeits the consideration for the renunciation, or must make compensation out of it to those injured by his reprobatory act. The Court will, when necessary, either compel an assignation, or will give a judgment producing an equivalent effect (per Ld. Mackenzie in *Peat*, 1839, 1 D. at 513). Where the party against whom the plea is stated happens to have an independent title to the subject which is the consideration for the renunciation, but has to vindicate his claim to the subject which *ex hypothesi* is to be renounced, the enforcement of the remedy is equally simple (cf. Ld. Cowan in *Davidson*, 9 M. at p. 1006). Where the plea is stated against one who is in possession both of the subject *ex hypothesi* to be renounced and of the consideration for the renunciation, the procedure must be direct, and must combine declaratory and executive conclusions.

10. *How far can Deed reprobated be founded on by Reprobator?*—It is necessary, in conclusion, to consider the limits of the application of the plea as it presents itself in the questions how far a beneficiary who has elected to reprobate the deed can found upon it indirectly, though not claiming under it directly, and, conversely, how far a beneficiary who has founded on the deed indirectly has thereby so approbated it as to be barred from afterwards claiming against it?

The answer depends upon whether his claim, in support of which the deed is referred to is one which the party would or would not have taken independently of the deed. A reference on this head, as illustrative of the position, may be made to the leading case of *Crawford v. Coutts* (1799, M. 14958, 4 Pat. App. 100, 2 Bligh 655; and 1806, 5 Pat. 73), where an

heir-at-law challenged successfully a deathbed conveyance which revoked a prior entail, and at the same time founded on it as a revocation of the entail. The House of Lords, reversing the judgment of the Court of Session, held that the plea of approbate and reprobate did not apply, on the ground that the revocation was not conditional on the validity as a conveyance of the deed containing it. In the opinion of the House, the heir-at-law did not claim under the deathbed deed. He claimed on his right at law. Unless he was met with a deed executed in *liege poustie*, and subsisting at the date of his ancestor's death, he was entitled to succeed. The prior entail was revoked by the deathbed deed, but the deathbed deed was ineffectual as a conveyance. There was therefore no impediment to his taking as heir-at-law (cf. *Wilson*, 1802, 4 Pat. 316; *Batley*, 2 Feb. 1815, F. C.; *Tweedie*, 1824, 2 Sh. App. 9). But where the benefit, though indirect, negative or in defence, is one which the party would not take except by operation of the deed, it is thought that the plea of approbate and reprobate does apply (*Johnston*, 1829, 7 S. 226; cf. *Crawford*, 1867, 5 M. 275, and particularly Ld. Benholm's opinion at p. 280).

**Elections.**—See COUNTY COUNCIL ELECTIONS; MUNICIPAL ELECTIONS; PARISH COUNCIL ELECTIONS; PARLIAMENTARY ELECTIONS; SCHOOL BOARD ELECTIONS; UNIVERSITY ELECTIONS; BALLOT; CORRUPT AND ILLEGAL PRACTICES; ELECTION PETITION; FRANCHISE.

## Supplemental Notes.



































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